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## Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?

David L. Rose

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# Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?

David L. Rose\*

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## I. INTRODUCTION

As we near the twenty-fifth anniversary of the passage of the Civil Rights Act of 1964,<sup>1</sup> an assessment of equal employment opportunity law is both natural and appropriate. Prior to 1964, the federal government had imposed equal employment opportunity obligations on itself as well as its contractors and subcontractors. And Title VII of the Act, which mandated such obligations, did not become effective until July 2, 1965.<sup>2</sup> Yet the Civil Rights Act of 1964, which was the first comprehensive legislation to address the problems of discrimination in American society, became the cornerstone of modern civil rights law, including equal employment opportunity law.

The leaders in the struggle to adopt the Civil Rights Act have largely passed from the public scene, and a new generation has reached adulthood with little knowledge of the conditions that called for its adoption. The time is ripe for review.

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1. Pub. L. No. 88-352, 78 Stat. 241 (1964). Titles II through XI of the Act are found at 42 U.S.C. §§ 2000a to 2000h-6 (1982). Title I of the Act, pertaining to voting rights, and found at 42 U.S.C. § 1971 (1982), was largely (but not entirely) superceded by the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973n (1982).

2. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

The ability of this country to integrate the diverse ethnic elements of its inhabitants stands in stark contrast to the experience of much of the rest of the world. While bitter rivalries over the years have separated French and German, Polish and Hungarian, and Catholic and Protestant Irish, their descendants have lived together in this country in relative harmony and have worked together to create an economy and a democracy which is the envy of much of the world.

The countries that have not been able to resolve equitably the differences between the different ethnic groups who live within their borders are numerous. Cyprus, Ethiopia, India, (Northern) Ireland, Israel, Lebanon, Sri Lanka, Somalia, South Africa, and the Sudan are but a few. The tensions and bitterness exemplified in those countries not only deprive the subordinate ethnic group of political freedom and economic opportunity, but they also threaten the fabric of society and the safety and well being of the entire populations.

In this country, political freedom and economic opportunity have been available for the great bulk of the population—if not to many of the immigrants themselves, at least to their children and grandchildren. Yet, the color line for many years prevented political and economic integration. Indeed, racial integration was contrary to the views of the great majority of the population at least until the recent past. Political and economic integration of the minority racial communities into the mainstream of American society was not possible until the country came to grips with the concept of equality of opportunity inherent in the Declaration of Independence and the fourteenth amendment, and adopted the Civil Rights Act of 1964.

The question of whether the political, economic, and social system in this country can incorporate persons of different color with the same success that it has with persons of different national origin remains unanswered, and the issue of whether this or any other country can fully utilize the capabilities of its women remains to be seen. Thus, the question of whether equality of opportunity can be translated from an ideal into more nearly a reality is for the future.

In my view, effective enforcement of the equal employment opportunity law in the next decade is a necessary, if not sufficient, predicate for the social and economic well being of the Nation. This Article reviews the accomplishments and shortcomings of federal equal employment opportunity law<sup>3</sup> over the last twenty-five years in the hope that

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3. While the Article is written in commemoration of the twenty-fifth anniversary of the Civil Rights Act, I use the term federal equal employment opportunity law to include not only Title VII of the Act, but also Executive Order 11,246 and its predecessors, and other provisions of federal law prohibiting discrimination in federal and federally assisted programs and activities.

the questions set forth above can be answered in the affirmative.

## II. HOPES AND ASPIRATIONS: THE HISTORICAL CONTEXT, LEGISLATIVE HISTORY, AND CONVENTIONAL WISDOM

### A. *The Situation in 1964*

Although the Civil War had been fought over the issue of slavery, and corrective legislation was enacted during Reconstruction, patterns of segregation and discrimination in employment quickly were formed and maintained in the post-Reconstruction era and remained virtually unaltered until the early 1960s.

The executive and judicial branches had been in the forefront of the civil rights battles in the 1940s and 1950s. Every president from Franklin Roosevelt to Lyndon Johnson had adopted executive orders on equal employment opportunity. President Roosevelt, with the additional authority he gained as a result of an impending war, adopted an executive order that, together with the labor shortages caused by the war, resulted in the increased participation of blacks in the work force and the widening acceptance of the proposition that blacks should be paid as much as whites for the doing the same work.<sup>4</sup> That order, however, was killed in 1945 by a deliberate congressional refusal to appropriate funds.<sup>5</sup> President Truman took the next major steps toward equal employment opportunity. After creating the President's Committee on Civil Rights in 1947, and receiving its comprehensive report in 1948, President Truman issued an executive order to desegregate the armed forces<sup>6</sup> and another prohibiting discrimination in federal employment.<sup>7</sup> In addition, he created the Committee on Government Contracts, which sought to prevent discrimination in government contracting.<sup>8</sup>

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4. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

5. See 110 CONG. REC. 8170 (1964) (statement of Sen. Tower); see also L. RUCHAMES, *RACE, JOBS & POLITICS: THE STORY OF FEPC* (1953).

6. Exec. Order No. 9981, 11 Fed. Reg. 14,153 (1948) (directing the desegregation of the armed forces). In 1947, President Truman, by executive order, created the President's Committee on Civil Rights, a committee consisting of prominent representatives of industry, labor, minority groups and the public. That Committee's report in 1948, called *To Secure These Rights*, set forth 40 suggestions for actions by the federal government to end segregation. See R. KLUGER, *SIMPLE JUSTICE* 250-55 (1976). The Order directing an end to segregation in the armed forces was recently described as "the only racial development [of the era] that pierced through symbolism." T. BRANCH, *PARTING THE WATERS* 13 (1988). President Truman's position favoring civil rights of blacks probably was also critical to the Attorney General's decision to participate as amicus curiae in *Shelley v. Kramer*, 334 U.S. 1 (1948).

7. Exec. Order No. 9980, 146 Fed. Reg. 4311 (1948) (creating a Fair Employment Board within the Civil Service Commission).

8. See Exec. Order No. 96,646, 10 Fed. Reg. 15,301 (1945); see also Exec. Order No. 10,210, 15 Fed. Reg. 1049 (1951); Exec. Order No. 10,216, 16 Fed. Reg. 1815 (1951); Exec. Order No.

President Eisenhower also adopted executive orders on nondiscrimination in federal employment and government contracting.<sup>9</sup> Vice President Richard Nixon chaired the Committee on Government Contracts. In that committee's final report to the President, it identified the need "to establish a positive policy of nondiscrimination"; and recommended legislation to create a commission to advance the cause of equal opportunity by government contractors and subcontractors.<sup>10</sup>

President Kennedy followed that recommendation and issued executive orders in 1961 and 1963 that merged the two separate committees on federal employment and government contracts into the President's Committee on Equal Employment Opportunity. This new Committee, chaired by Vice President Lyndon Johnson, had jurisdiction over both the federal civil service and government contracting and subcontracting.<sup>11</sup> Unlike its predecessors, which had served largely consultative and advisory functions, this new Committee was granted enforcement authority, including the authority to recommend action by the Justice Department or to institute administrative proceedings to terminate present contracts and bar the awarding of future government contracts.<sup>12</sup>

Despite the expressed policies of the executive branch since President Truman's Executive Order 9980 in 1948, employment in the federal government remained largely segregated in the 1950s and the early 1960s, with sharply defined jobs for whites and blacks.<sup>13</sup> Segregation and discrimination also continued with little change in the private sector and in most state and local governments, despite executive orders

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10,308, 16 Fed. Reg. 12,303 (1951) (mandating nondiscrimination in government contracting).

9. See Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953), amended by Exec. Order No. 10,482, 18 Fed. Reg. 4944 (1953) (government contracting); see also Exec. Order No. 10,590, 20 Fed. Reg. 409 (1955).

10. COMM. ON GOVERNMENT CONTRACTS, FINAL REPORT TO PRESIDENT EISENHOWER: PATTERN FOR PROGRESS 14-15 (U.S. Govt. Printing Office No. 0-578094 1960) [hereinafter FINAL REPORT].

11. Exec. Order No. 11,114, 123 Fed. Reg. 6485 (1963); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961). Then Secretary of Labor Willard Wirtz was vice-chairperson of this Committee, which was staffed primarily by Labor Department personnel.

12. See *supra* note 6; see also 110 CONG. REC. 8170 (1964) (statements of Sen. Tower).

13. When I arrived in the Civil Division of the Justice Department in 1956, there was one black lawyer out of more than 200 in that Division and one black secretary. All the messengers, however, were black males and all the elevator operators were black females. The first black lawyer employed by the Department in the postwar era, Maceo Hubbard, was hired by Attorney General Tom Clark in 1946. See *The Forum Talks With Maceo Hubbard*, 7 *Civ. Rts. F. 1* (U.S. Dep't of Justice, Civil Rights Division, Summer/Fall 1984). My understanding from conversations with him is that Mr. Hubbard was the first black lawyer hired in the Department since the Administration of President Taft. Attorney General Robert Kennedy found when he arrived at the Department of Justice in 1961 that there were only 10 "Negro" lawyers out of 950 lawyers. Address by Robert F. Kennedy to the University of Georgia Law School on May 6, 1961, quoted in H. GOLDEN, MR. KENNEDY AND THE NEGROES (1964).

on equal employment opportunity and the adoption of fair employment laws by twenty-five states in the postwar period (mostly the larger industrial states outside of the South).

Blacks were excluded from traditionally "white" jobs and were limited to lower paying, less desirable jobs throughout the South. While the discriminatory practices of employers and unions in other regions were frequently less explicit and less rigid, custom, inertia, seniority and referral systems, union pressure, and informal practices accomplished much the same result throughout the rest of the country.<sup>14</sup> For example, in the trucking industry only whites were allowed to drive trucks in the higher paying "long haul" or "over the road" jobs, while blacks were relegated to "city" driving in some locations and were excluded from all positions except janitor or janitor and dockworker in others.<sup>15</sup> In the paper industry, blacks worked in the woodyard while whites operated the equipment inside.<sup>16</sup> In the steel industry, blacks held the physically strenuous, hot and dirty jobs, while the better paying supervisory positions were reserved for whites.<sup>17</sup>

Although discrimination by unions had been declared unlawful as early as 1944,<sup>18</sup> many unions retained their "white only" clauses, while others deleted the clauses but not the practices underlying them.<sup>19</sup> Segregated unions continued to exist.<sup>20</sup> While the industrial unions such as the United Automobile Workers and the Steel Workers tended to admit blacks as well as whites, they did little to break down the established job hierarchies.

While tradition and the nature of the work played an important role in the racial identification of jobs, in my view the principal determinant was the rate of pay. For example, when the Teamsters organized the trucking industry in the South in the 1950s, the rate of pay doubled for the dockworkers in Memphis, where dockworkers traditionally had been black. The employer immediately changed the job from an all-black gang with a black "caller" (who would call out the destination) and a white "reader" (who would read the bill of lading) to a "one

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14. See H. NORTHROP, *NEGRO EMPLOYMENT IN BASIC INDUSTRY* (1970) (citing authorities).

15. See *United States v. Roadway Express Co.*, 457 F.2d 854, 855-56 (6th Cir. 1972).

16. See, e.g., *Local 189, United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

17. See Chambers & Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 *LAB. LAW.* 235, 238 (1985).

18. See, e.g., *Steele v. Louisville & N. Ry.*, 323 U.S. 192 (1944).

19. See Chambers & Goldstein, *supra* note 17, at 237-38.

20. See *Local 189, United Papermakers*, 416 F.2d at 980; see also *United States v. Granolini*, 301 F. Supp. 39 (D.R.I. 1969). In *Local 189, United Papermakers*, the suit was brought against Local 189, the white local, whose threat to strike against a new seniority system demanded by the Department of Labor precipitated the suit. Local 189A, the black ("colored") local, included all the black employees and supported the government's suit.

man gang” in which each worker was in theory supposed to read the bill of lading and determine where the cargo was to go. Literacy tests were given and a number of the black dockworkers were fired. The seniority roster showed that every person hired as a dockworker in Memphis after 1957 until the effective date of Title VII was white.<sup>21</sup> Other minorities had made some progress during and after World War II, but pay rates showed that they too continued to be subject to overt discrimination in many parts of the country. In 1962, nonwhite males earned only 59.9 percent the income of white males, and nonwhite females earned only 50.3 percent the income of white females.<sup>22</sup>

The role of women in employment also was severely circumscribed by custom, social pressure, and practice. During World War II, women worked throughout industry, and successfully performed many jobs previously restricted to men.<sup>23</sup> After the war, the prevailing view that these jobs should be reserved for men to support their wives and children was used to oust the women from these jobs.<sup>24</sup> When the “boys” came home from the war, the “girls” went home to become mothers and housekeepers, or were relegated to traditionally female jobs.<sup>25</sup> While some professional schools opened their doors to women in the postwar era, the number of women entering professions other than teaching and nursing was small, and their employment opportunities were severely limited.<sup>26</sup> Earnings statistics demonstrate the inferior position of women in the

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21. The record in *Roadway Express Co.*, 457 F.2d at 854, in which I was the government's lead trial counsel, shows these facts.

22. H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 149 table 3 (1964) [hereinafter H.R. REP. No. 914] (additional views of Reps. McCulloch, Lindsey, Cahill, Shriver, MacGregor, Mathias, and Bromwell).

23. “Rosy the Riveter” was not only a slogan during the war, but represented hundreds of thousands of women engaged in the war effort holding jobs that had previously been reserved for men only.

24. The prevailing view was expressed in Massachusetts, where a state law (presumably passed during the Depression) prohibited married women from teaching in the public schools. The result was that all my teachers in the first eight years of school were widows or spinsters, as were all the women teaching high school. While I do not know how widespread these laws were, I doubt that they were restricted to Massachusetts.

25. Of the many thousands of women who worked in the steel industry during World War II, all but a handful returned home or to traditionally female jobs within a few months of the end of the war. The great majority of the women did so willingly. The men who had left their jobs to serve in the armed forces had a right to re-enstatement under the Selective Service Act. Interview with Robert T. Moore, former Deputy Chief, Employment Litigation Section, Civil Rights Division (the government's lead trial attorney in *United States v. United States Steel Corp.*, 553 F.2d 451 (5th Cir.), *cert. denied*, 435 U.S. 914 (1977)).

26. In the fall of 1950, 13 “unusually qualified women” were admitted to the Harvard Law School class of 520 men. The number and percentage of women admitted was small until the 1970s. Forty percent of the Class of 1990 are women, and the percentage of women admitted in recent years has been approximately the same as the percentage of men. *Women at Harvard Law School: The First 35 Years*, HARV. L. BULL., Summer, 1988, at 5, 10, 11.

workplace during this period. White females in 1960 earned approximately one half (50.3 percent) the income of white males, and nonwhite females earned only 41.5 percent the income of nonwhite males, and only 24.8 percent the income of white males.<sup>27</sup>

### B. *The Goals of the Civil Rights Act*

The Civil Rights Act of 1964, a comprehensive piece of legislation with eleven titles, included provisions mandating nondiscrimination in public accommodations, public facilities, public education, and federally assisted programs, as well as in employment. Consideration of the bill was spurred by confrontations between black and other demonstrators and police in Birmingham and elsewhere in the South and by President Kennedy's radio and television *Report to the American People on Civil Rights* on June 11, 1963; by the massive civil rights march on Washington in August 1963, which was highlighted by Martin Luther King's "I Have a Dream" speech; and later by the assassination of President Kennedy in November 1963.<sup>28</sup>

Hearings were held during the late spring and summer of 1963, and the bill passed the House of Representatives on February 10, 1964. In the Senate the bill went directly to the floor without consideration by the Senate Judiciary Committee and produced a filibuster that delayed final passage until June 17, 1964. The legislative history is particularly

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27. H.R. REP. NO. 914, *supra* note 22, at 149 table 3.

28. Senator John F. Kennedy's telephone call to Coretta Scott King while Martin Luther King, Jr., was in a Fulton County jail was one of the decisive events in the election campaign of 1960. T. BRANCH, *supra* note 6, at 351-78. In one of his first acts in office, President Kennedy issued Executive Order 10,925, requiring federal contractors and subcontractors to take affirmative action to ensure that hiring and employment were free from discrimination on grounds of race, creed, or national origin. Exec. Order No. 10,925, 3 C.F.R. § 448 (1959-63). In 1962, he adopted an executive order directing an end to segregation in federally assisted housing. In a television address to the Nation on June 11, 1963, a few days before he sent to Congress the bill which became the Civil Rights Act of 1964, President Kennedy had urged the passage of a comprehensive civil rights bill on moral and ethical, as well as practical grounds. J. Kennedy, *Report to the American People on Civil Rights* on June 11, 1963, 1963 PUB. PAPERS Doc. No. 237 [hereinafter Kennedy Address]. The Kennedy Administration strongly supported the bill, both before and after the March on Washington in August 1963. President Kennedy's assassination in November 1963 evoked great sorrow in the country, and a widespread belief that the country ought to attempt to achieve his goals. President Kennedy's commitment to civil rights, and his assassination, linked him in the public's thought to the first "Emancipation President," Abraham Lincoln.

President Johnson adopted the Kennedy Administration's civil rights goals as his own, made the passage of the civil rights act a high priority, and utilized President Kennedy's commitment to the passage of the bill as one of the weapons in his struggle to obtain passage of the bill in the Congress. See generally H. SMITH, *INSIDE WASHINGTON* (1988).

Harry Golden reflected the views of many Americans of the time when he stated that Mr. Kennedy "was the first President to support the Negroes' drive for equality by making public announcement that the security of the nation, its sacred honor and its future are inseparable from its guarantee of civil rights." H. GOLDEN, *supra* note 13.

difficult to decipher because so many different issues were being considered, because the bill was sent directly to the floor of the Senate, and because Title VII was amended on the floor of the Senate during the filibuster.<sup>29</sup>

The bill that became Title VII was drafted and reported on favorably in the House Committee on Education and Labor in 1962, and after revision was reported on favorably again by that same Committee in 1963.<sup>30</sup> The Education and Labor Committee called for legislation to implement "a national policy on equal employment opportunity, predicated on individual merit, competence and capability."<sup>31</sup> Relying upon statistical material submitted by Secretary of Labor Willard Wirtz, the Committee noted that, at least in part because of discriminatory practices, nonwhite male workers were three times as likely to be unemployed as their white counterparts, and nonwhite workers were concentrated in unskilled or semiskilled jobs, regardless of education and other qualifications.<sup>32</sup> The Committee concluded that the continuing progress of a democratic society called for full utilization of manpower resources, which required equal employment opportunity.<sup>33</sup>

Apparently for tactical reasons, the House Judiciary Committee Report on the full bill was uninformative on the purposes and scope of Title VII.<sup>34</sup> The Report reflected President Kennedy's views that the bill as a whole was necessary to fulfill the "ideals and principles to which the country is dedicated." The bill was "designed primarily to protect and provide effective means to enforce the civil rights of persons within the jurisdiction of the United States."<sup>35</sup>

29. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 10-11 (C. Alexander ed. 1969) [hereinafter LEGISLATIVE HISTORY].

30. H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963) [hereinafter H.R. REP. NO. 570]; H.R. REP. NO. 1370, 87th Cong., 2d Sess. (1962).

31. H.R. REP. NO. 570, *supra* note 30, at 2.

32. *Id.*

33. *Id.* at 2 n.14.

34. H.R. REP. NO. 914, *supra* note 22, at 18 (general statement); see also *id.* at 26-32.

35. *Id.* at 16. The Report noted:

In various regions of the country there is discrimination against minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birth-right of all citizens.

. . . .

. . . [I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet the national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition by all of our people of the incompatibility of such discrimination with our ideals and the principles to

The portion of the Judiciary Committee Report dealing with Title VII simply paraphrased Title VII's provisions with no elaboration or explanation. The Report contained no discussion of sex discrimination in employment because the bill as recommended by that Committee contained no prohibition against discrimination based on sex.<sup>36</sup>

The views of the Republican members of the Judiciary Committee, like the Report of the House Committee on Education and Labor, shed more light on the objectives of the bill. In order to support their opinion that the evidence of widespread employment discrimination was "overwhelming,"<sup>37</sup> the Republicans relied upon reports from the Department of Labor showing that nonwhite unemployment was 11.4 percent, as compared to 4.9 percent for whites, that the jobs for employed nonwhites were concentrated in the semiskilled and nonskilled positions, that the median annual wages and salary incomes of employed nonwhite males were only 59.9 percent of those of white males, and that the median income for nonwhite women was only 50.3 percent of the median income for white females.<sup>38</sup> Republican Congressman William M. McCulloch and his colleagues noted that the "severe inequality" in employment in the United States created a "condition of marginal existence" for the average black. The Republicans also pointed out the economic inefficiency caused by restricting the employment opportunities of blacks. In particular, the Republicans argued that these discriminatory practices limited purchasing power and acted as a brake upon potential increases in the gross national product.<sup>39</sup> The Republicans concluded:

Aside from the political and economic considerations, however, we believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is

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which this country is dedicated.

*Id.* at 18.

36. See *infra* notes 42-43 and accompanying text.

37. *Id.* at 147. Representative McCulloch and his colleagues stated:

In other titles of this bill we have endeavored to protect the Negro's right to first-class citizenship. Through voting, education, equal protection of the laws, and free access to places of public accommodations, means have been fashioned to eliminate racial discrimination.

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.

Testimony supporting the fact of discrimination in employment is overwhelming.

*Id.*

38. *Id.* at 148-49. The same table showed that the median income for white females was only 49% that of white males, and that the median income for nonwhite females was only 41% of that of black males. *Id.*

39. *Id.* at 149. The Republicans further noted that through "toleration of discriminatory practices American industry is not obtaining the quantity of skilled workers it needs." *Id.*

such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership, and to enhance mankind.<sup>40</sup>

The themes indicated in the committee reports were reflected in the floor debate. The major change made to Title VII on the floor of the House was the adoption of the amendment that inserted sex discrimination among the prohibited practices. This amendment was proposed by Representative Howard Smith of Virginia, Chairperson of the House Rules Committee and a leading opponent of the legislation. Representative Smith showed his attitude toward his own amendment with his discussion of a letter he received from a "lady" complaining about the "grave injustice" of having more females than males in the country, which "shut[] off the 'right' of every female to have a husband of her own."<sup>41</sup> The merriment on the floor produced by that episode, however, may have provoked anger among the few female representatives in the House at that time.<sup>42</sup> After considerable debate, in which the few female members of the House took part, the amendment passed by a vote of 168 to 133 and was retained in Title VII.<sup>43</sup>

The Senate Committee on Labor and Public Welfare held hearings on an equal employment opportunity bill, including the bill proposed by Senator Hubert Humphrey, in the summer of 1963.<sup>44</sup> That Committee issued its report on February 4, 1964, while the omnibus civil rights bill was on the floor of the House.<sup>45</sup> In a report that was not widely noted by the commentators or the courts until Chief Justice Burger's decision in *Hishon v. King & Spalding*,<sup>46</sup> the Senate Labor Committee relied upon the same kinds of statistics from the Department of Labor that were relied upon by the House Committee on Education and Labor and the Republican members of the Judiciary Committee in drafting their reported views on the proposed legislation. The Senate Committee found that "overt or covert selective devices, intentional or uninten-

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40. *Id.* at 151.

41. 110 CONG. REC. 2577 (1964) (statement of Rep. Smith).

42. Rep. Griffiths of Michigan introduced her comments in support of the Smith Amendment by stating: "Mr. Chairman, I presume that if there had been any necessity to have pointed out that women were a second-class sex, the laughter would have proved it." *Id.* at 2578 (statement of Rep. Griffiths).

43. *Id.* at 2577-84.

44. *Senate Bill 1937: Hearings on Equal Employment Opportunity before the Subcomm. on Employment of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. (1963) [hereinafter *Senate Hearings*].

45. S. REP. NO. 867, 88th Cong., 2d Sess. (1964) [hereinafter S. REP. NO. 867].

46. 467 U.S. 69 (1984); see *id.* at 75; S. REP. NO. 867, *supra* note 45, at 2. The provision of the Humphrey Bill which paralleled § 703(a)(2) made unlawful any employment practice which, because of race, etc. "results or tends to result in a material disadvantage to any individual in obtaining employment or incidents of employment." See *id.* at 3-5.

tional, generally prevail throughout the major part of the white economy" and recommended the Humphrey bill, which contained procedures different from Title VII but substantive provisions that directly paralleled those of Title VII.<sup>47</sup> That bill was designed specifically to prohibit all "institutionalized . . . discrimination," particularly that discrimination "preserved through form, habit or inertia."<sup>48</sup> The Committee noted that if the black labor force, at its then present educational level, had been fairly and fully utilized, the gain to the national economy would have been thirteen billion dollars.<sup>49</sup>

On the floor of the Senate, Senator Humphrey introduced the omnibus civil rights bill that had passed in the House. In supporting Title VII, he argued that blacks and other minority groups did not have an equal chance at being hired for, promoted to, or assigned to desirable jobs, and that blacks were the principal victims of discrimination in employment, citing the data relied upon by Secretary Wirtz and others.<sup>50</sup> Senator Humphrey stated that the "crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them."<sup>51</sup> Senator Kuchel of California, cosponsor of the omnibus bill, referred to the facts found by the Senate Labor Committee in order to bolster support for Title VII.<sup>52</sup>

In the Senate, as in the House, the bulk of the debate concerned the procedures for enforcing the provisions for seniority, quotas, and racial balance in Title VII and did not focus on the purposes of the bill. The major amendments to Title VII also were directed to those issues.<sup>53</sup> Thus, the purposes of Title VII were little debated.

Congress adopted the Equal Employment Opportunity Act of 1972 to amend Title VII of the Civil Rights Act of 1964.<sup>54</sup> The legislative history of this Act shows that it was designed primarily to improve the administration and effectiveness of Title VII. The Senate Labor Committee Report stated that the principal purpose of the legislation was to provide the Equal Employment Opportunity Commission (EEOC) with "a method for enforcing the rights of those workers who have been sub-

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47. S. REP. No. 867, *supra* note 45, at 2.

48. *Id.* at 11.

49. *Id.*

50. 110 CONG. REC. 6547 (1964).

51. *Id.* at 6548.

52. *Id.* at 6562.

53. The Mansfield-Dirksen amendment deprived the EEOC of authority to bring suit, but conferred the authority to bring "pattern or practice" suits on the Justice Department. *See id.* at 12,818-20.

54. Puh. L. No. 92-261, 86 Stat. 103 (1972) (amending 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

jected to unlawful employment practices.”<sup>55</sup> An additional objective of the Act was to broaden the coverage of Title VII to include employees of state and local governments and the federal government.<sup>56</sup> The Senate Labor Committee noted that the goal of social and economic equality for blacks was far from fulfillment.<sup>57</sup> The Committee also called attention to the disadvantaged position of Spanish-speaking Americans and, for the first time, to the disparities between male and female earnings and job placement; the Committee noted that females were “still subject to blatant discrimination” in employment.<sup>58</sup>

Two themes emerge from the legislative history of Title VII. First, the Civil Rights Act, and particularly Title VII, was adopted because it was the only course consistent with the “ideals and principles to which this country is dedicated.”<sup>59</sup> Second, the Act was adopted in order to eliminate the discrimination that, at least in part, caused the disparities between blacks and whites (and later between men and women) in unemployment, income, and the kinds of jobs held. The full utilization of the human resources available in the minority communities, many believed, would assist the Nation economically along with fulfilling the ideals of Title VII.<sup>60</sup>

### C. Modest Expectations for Title VII in 1964

Although the congressional adoption of the Civil Rights Act of 1964 was viewed with enthusiasm in the areas of public accommodations, public facilities, and education, the leadership of the civil rights community was disappointed with Title VII and felt that it was largely unenforceable. The EEOC had been modeled on the National Labor Relations Board. Clarence Mitchell, the Director of the Washington Bureau of the NAACP, had participated in enforcing President Roosevelt's Executive Order<sup>61</sup> as a member of the Fair Employment

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55. S. REP. No. 415, 92d Cong., 1st Sess. (1971) [hereinafter S. REP. No. 415].

56. *Id.* at 2.

57. *Id.* at 6. The Committee Report stated: “[w]hile some progress had been made toward bettering the economic position of the Nation's black population, the avowed goal of social and economic equality is not yet anywhere near a reality.” *Id.*

58. *Id.* at 6-8.

59. See H.R. REP. No. 914, *supra* note 22, at 18. See generally Kennedy Address, *supra* note 28.

60. See H.R. REP. No. 914, *supra* note 22; S. REP. No. 867, *supra* note 45; see also *supra* notes 14-22, 44-53 and accompanying text.

61. Clarence M. Mitchell, Jr., reprinted in *CRISIS MAG.*, Jan. 1989, at 58. During most of the time that he was the Director of the Washington Bureau of the NAACP, Mr. Mitchell was also the legislative chairperson of the Leadership Conference on Civil Rights, a broad coalition of civil rights, religious, and labor organizations that had a key role in advocating and drafting the modern civil rights acts of 1957, 1960, 1964, 1965, 1968, and 1972.

Practices Commission<sup>62</sup> during World War II. He and other leaders of the civil rights groups decided that effective enforcement of any equal employment opportunity legislation could be accomplished only through administrative cease and desist authority of the kind held by the NLRB. Yet the EEOC had been stripped of cease and desist authority in the House bill in order to attract sufficient Republican support. Under an amendment sponsored by Senator Everett Dirksen, the EEOC was deprived even of the authority to institute its own suits. On the floor of the Senate, Senator Clark of Pennsylvania described the Dirksen compromise as weakening the bill because it deprived the EEOC of authority to initiate suits.<sup>63</sup> Senator Case of New Jersey responded that the real weakening of the enforcement scheme took place when the House bill, which authorized suits by the EEOC, was put forward instead of the Humphrey bill, which created an Equal Employment Opportunity Administration in the Department of Labor with cease and desist authority.<sup>64</sup>

The commentators viewed Title VII with skepticism for several reasons. The fair employment practice laws adopted by twenty-five states, including most of the larger states, had little effect.<sup>65</sup> Title VII contained elements of various state laws that already had proven to be unsuccessful, including the establishment of a commission with authority to conciliate, but no power to compel action. Enforcement was limited to suits by private persons or the Attorney General. The commentators saw the success of the measure as dependent primarily upon the willingness and ability of the Attorney General to bring suits, and the interpretation of the law by the courts.<sup>66</sup>

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62. See Exec. Order No. 9346, 8 Fed. Reg. 7183-84 (1943); Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). This Commission was modeled on the National Labor Relations Board and consisted of a full-time chairperson and six other members.

63. 110 CONG. REC. 12,595-99 (1964).

64. *Id.*

65. See Hill, *Twenty Years of State Fair Employment Practices Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22, 32 (1964).

66. See, e.g., Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. INDUS. & COM. L. REV. 473 (1966); Schmidt, *Title VII: Coverage and Comments*, 7 B.C. INDUS. & COM. L. REV. 459, 471-72 (1966); see also M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 73-80 (1966). The following comment by Professor Sovrn is illustrative:

The commission with power to conciliate but not to compel has been tried and regularly found wanting. Letting the complainant sue was one of the original modes of anti-discrimination enforcement (criminal prosecution was the other).

Effective enforcement machinery is indispensable to an effective equal employment opportunity law. The experience of state and local agencies shows that impotence will frequently be met with intransigence, that conciliation works best when compulsion is waiting in the wings. Consider for a moment how an employer intent on preserving his discriminatory practices might react to a visit from the Equal Employment Opportunity Commission. If he is polite but firm, it must eventually go away. At that point, the employer may be sued by the

## III. ENFORCEMENT OF FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAW

A. *The Early Years (1965-1969)*

From July 2, 1965, when Title VII went into effect, at least through 1967, little progress was made in the desegregation of jobs or job opportunities under either Title VII or the executive orders intended to prevent discrimination in employment.<sup>67</sup>

## 1. The EEOC in the Early Years

Because the EEOC had no enforcement authority, but only the authority to investigate and to attempt conciliation, it was unable to enforce the Civil Rights Act by itself. Moreover, Congress also had deprived the EEOC of the authority to adopt substantive interpretive regulations. Thus, the Commission was limited to promulgating record-keeping and reporting regulations, and to formulating interpretive "guidelines," which if followed would exempt an employer from liability.<sup>68</sup>

The first years of the Commission were devoted not only to dealing with organizational problems, but also to the development of procedural, reporting, and record-keeping regulations, and the development of interpretive guidelines. Among the most significant of the early actions by the Commission was the adoption in early 1966 of record-keeping and reporting requirements for employers, labor organizations, and apprenticeship committees. These regulations required the reporting employer or organization to identify the number of employees, union members, and apprentices by job category and by race, sex, and national origin, and the filing of the so-called EEO-1 series of reports with these numbers.<sup>69</sup>

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person harmed, but the odds are against it, and if he does sue, one can always settle with him instead of the Commission.

Whether this model will become reality may well depend upon the Attorney General. If he believes vigorous enforcement desirable, if he interprets Title VII to permit him to sue and intervene frequently, and if the courts sustain his interpretation, respondents can be expected to conciliate in droves. But if any of these three conditions is not met, the employment title of the Civil Rights Act of 1964 could prove to be a serious disappointment.

*Id.* at 79-80.

67. On September 24, 1965, President Johnson issued Executive Order 11,246, which transferred enforcement responsibility for federal contractors and subcontractors from the President's Committee to the Secretary of Labor, but left the substantive and enforcement procedures otherwise unchanged. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965). He amended that Order in 1967 to insert the word "sex," where race, color, and national origin appeared, so as to provide for equal employment opportunity and affirmative action for women. Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967).

68. Section 713(b), 42 U.S.C. § 2000e-12(b)(1) (1982), makes good faith reliance upon any written interpretation or opinion of the Commission a defense for at least monetary liability.

69. See 29 C.F.R. § 1602.7 (1988). Reports by joint apprenticeship committees (EEO-2 Re-

The EEOC adopted in 1966 the first "Guidelines on Employment Testing Procedures," which interpreted the term "professionally developed ability test" in the Act to mean "a test which fairly measures the knowledge or skills required by the particular job or jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a job or class of jobs."<sup>70</sup> Similar guidelines were adopted for discrimination based on sex and religion.<sup>71</sup> In its regulations and guidelines the EEOC usually took an expansive view of the meaning and coverage of Title VII, except in matters of sex discrimination.<sup>72</sup> Similarly, although its authority to do so was doubtful, the Commission, through its General Counsel, began filing amicus curiae briefs and memoranda in private suits, usually urging support for an expansive interpretation of Title VII on procedural and substantive issues.

Although the Commission had anticipated receiving only 2000 charges of discrimination in its first year, it received 8856. The number of charges rose to 12,148 in 1969, and to 71,023 in 1975.<sup>73</sup> Thus, almost from the beginning, the Commission was swamped by charges, and it began to fall further and further behind in its response to the charges. With the vast number of charges filed, the uncertainty of what the law required, the lack of expertise among most of the personnel, and the lack of an internal check on what kinds of evidence were necessary and

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ports) and by building trade unions (EEO-3 Reports) followed. 29 C.F.R. §§ 1602.15, 1602.22 (1988). The minority groups covered by the EEO-1 Form were those formerly covered by the Standard Form 40, which had been used in the executive order enforcement program. As Congress had specified, the EEO-1 Form was developed by the Commission, the Office of Federal Contracts Compliance Programs, and the Plans for Progress organization. See Hammerman, *Affirmative-Action Stalemate: A Second Perspective*, 93 REFLECTIONS 130, 131 (1988).

70. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 n.9 (1971) (quoting Guidelines adopted August 24, 1966). The position of the EEOC on these Guidelines was elaborated on August 1, 1970, after the Supreme Court had granted certiorari in *Griggs*, but before argument and decision in *Griggs. Id.*

71. See 29 C.F.R. pt. 1604 (1988) (guidelines on Discrimination Because of Sex); 29 C.F.R. pt. 1605 (1988) (guidelines on Discrimination Because of Religion).

72. The original EEOC guideline on sex as a bona fide occupational qualification was not favorable to the equal employment opportunity rights of women. That guideline, for example, recognized that most states had enacted laws which were intended to protect women in employment. The Commission set forth its belief that Congress did not intend to disturb such laws which were intended to and had the effect of protecting women against exploitation and hazard, so that compliance with a state law which prohibited women from being employed in jobs which required them to lift more than a specified number of pounds would not be considered a violation of Title VII. That guideline is quoted and discussed in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). The courts of course held that the ability to lift specified amounts without danger should be determined on an individual basis. The Commission adopted a much more liberal set of Guidelines on Discrimination Because of Sex in 1972. 37 Fed. Reg. 6836 (1972) (codified at 29 C.F.R. pt. 1604 (1988)).

73. Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 921 (1978).

appropriate, the investigations usually were not marked by care or thoroughness.<sup>74</sup>

## 2. Private Litigation

While numerous private suits were filed during the early years of Title VII, few of those suits reached trial because of the many procedural issues that were presented.<sup>75</sup> One exception, however, was a district court decision holding unlawful a seniority system that perpetuated the effects of past discrimination.<sup>76</sup> While the initial procedural rulings favored a broad interpretation of the rights of minorities,<sup>77</sup> private litigation provided little guidance to employers, labor organizations, or to the government enforcement agencies on the substantive obligations under the law.

## 3. The Department of Labor

The Labor Department's Office of Federal Contract Compliance took an aggressive posture in the mid-1960s in enforcing the executive orders regulating federal contractors. Lack of clarity in the law on testing and seniority, however, and lack of direct control over building trades unions—with whom the federal government had no direct contractual relationship—slowed the program and tended to result in requests for assistance from the Justice Department, rather than administrative proceedings to bar the awarding of contracts.

## 4. The Department of Justice

The Civil Rights Division of the Justice Department decided after passage of the Civil Rights Act to give priority first to public accommodations, then to voting, and then to school desegregation. As a result, only two employment law suits were brought in 1965 and 1966 by the Division: One that was occasioned by the threat of a strike by the building trades against the hiring of a black plumber for the construction of the St. Louis Arch, a federally financed construction project covered by the executive order program;<sup>78</sup> and another against the New Orleans

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74. I recall a meeting in the summer of 1968 in Assistant Attorney General Pollak's office on the issue of what could be done to improve the quality of the files referred from the EEOC. Periodic meetings on that issue followed for the next several years without any solution.

75. See Chambers & Goldstein, *supra* note 17, at 241-42.

76. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968) (concerning a private suit brought by the NAACP Legal Defense Fund in which EEOC filed an amicus brief).

77. See, e.g., Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) (ruling that racial discrimination is by definition discrimination against a class and adopting a broad reading of class action suits under Fed. R. Civ. P. 23).

78. Telephone conversation with Gerald W. Jones, Chief, Voting Section, Civil Rights Divi-

local of the asbestos workers union, following a referral from the EEOC and an earlier suit filed by three blacks.<sup>79</sup>

By the summer of 1967 there still were no substantive appellate decisions and only two significant district court decisions interpreting Title VII.<sup>80</sup> At that time, however, the Attorney General, probably in response to the Leadership Conference on Civil Rights<sup>81</sup> and at least in part because little progress had been made elsewhere, decided to give priority to employment litigation.

The Justice Department's objective for the next two years was to obtain substantive determinations from the courts so that employers and unions would know their obligations, blacks and other employees and applicants would know their rights, and the enforcement agencies (principally the EEOC and the Labor Department) would know how to process charges of discrimination.<sup>82</sup> The Justice Department's participation in private suits through amicus curiae briefs, which raised significant issues of law, accomplished the same results. Six employment discrimination suits were filed in 1967 and twenty-six were filed in 1968. More significantly, some of the suits quickly reached the merits and produced judicial interpretation of Title VII and Executive Order 11,246, which provided for enforcement of employment laws against federal contractors and subcontractors.<sup>83</sup>

From the earliest cases the chief issue in employment discrimination law was whether Title VII and Executive Order 11,246 prohibited only purposeful discrimination, or whether they also prohibited unnecessary practices that were neutral on their face but had a discrimina-

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sion, U.S. Dep't of Justice (Feb. 1, 1989). Mr. Jones was attorney for the United States in that suit. *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969) (*St. Louis Arch* case). The *St. Louis Arch* case was initially brought against the St. Louis Building and Construction Trades Council, but the lead defendant and several craft unions were dismissed by agreement after their promises to take corrective measures. *Id.* at 124 n.1.

79. *Vogler v. Asbestos Workers Local 53*, 1 Empl. Prac. Dec. (CCH) ¶ 9791 (E.D. La. 1967).

80. *Quarles*, 279 F. Supp. at 505 (concerning a private suit brought by the NAACP Legal Defense Fund in which EEOC filed an amicus brief); *Vogler v. Local 53, Int'l Ass'n of Heat & Frost Insulators*, 1 Empl. Prac. Dec. (CCH) ¶ 9791 (E.D. La. 1967) (separate suits by private parties and the United States that were consolidated).

81. The Leadership Conference on Civil Rights represents a broad coalition of civil rights, religious, and labor organizations in Washington before the Congress and agencies of the executive branch. Clarence Mitchell, Director of the Washington Bureau of the NAACP, was also the Chairperson of the Legislative Committee of the Leadership Conference.

82. I was recruited to work in the Civil Rights Division in February 1967 by Assistant Attorney General John Doar, who at that time mentioned his desire to bring employment cases and to have me do it. I joined the Division on April 4, 1967, as Special Assistant to the Attorney General (then Ramsey Clark) for Title VI of the Civil Rights Act. Although Title VI specifically exempted most employment from its coverage, I understood from my discussions with Mr. Doar that it would be part of my duties to generate and bring some employment cases to help define and clarify the law.

83. See *infra* note 87 and accompanying text.

tory impact. The Department of Justice sought to clarify this issue by raising in its first three suits the question of whether nepotism and other neutral practices violated Title VII. The first of these suits involved the Asbestos Workers Local 53, a union consisting only of white journeymen, and their practice of restricting membership to the sons (or nephews raised as sons) of union members. The District Court not only found that this practice was unlawful, but also ruled unlawful the practices of relying upon recommendations of present members and of requiring a majority vote for admission to membership.<sup>84</sup> In the second suit the District Court did not rule directly on the issue of nepotism and denied relief because the government failed to identify any black person who had sought and been denied membership.<sup>85</sup> In the third suit the District Court held that a seniority system that had perpetuated the effects of pre-Act discrimination was unlawful under both Title VII and Executive Order 11,246.<sup>86</sup>

### B. Years of Growth and Development (1969-1975)

#### 1. Developments in the Law

The first four substantive appellate decisions on the merits of claims brought under Title VII's equal employment opportunity provisions were rendered in 1969. The Department of Justice was a plaintiff in each of these four suits, which included the three described above.<sup>87</sup> In each of the first three cases, the courts of appeals ruled that Title VII not only prohibited purposeful discrimination, but also that it prohibited unnecessary practices that were discriminatory in effect.<sup>88</sup>

The fourth appellate decision held that when statistics showed that the effects of a segregated employment system continued to limit blacks to lower paying, less desirable jobs, these statistics constituted a prima facie showing of continuing discrimination.<sup>89</sup> Accordingly, the Court of Appeals for the Fifth Circuit held that the District Court had erred in failing to grant mandatory preliminary relief.<sup>90</sup> In 1970, the Supreme Court denied certiorari in a case in which the Court of Appeals had found that a seniority system which perpetuated the effects of pre-Act

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84. *Vogler*, 1 Empl. Prac. Dec. (CCH) ¶ 9791.

85. *United States v. Sheet Metal Workers Local 36*, 280 F. Supp. 719 (E.D. Mo. 1968), *rev'd*, 416 F.2d 123 (8th Cir. 1969).

86. *United States v. Local 189 United Papermakers*, 282 F. Supp. 39 (E.D. La. 1968).

87. See *supra* notes 80, 84-86 and accompanying text.

88. *Local 53, Int'l Ass'n Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Local 189 United Papermakers v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *St. Louis Arch* case, 416 F.2d at 123.

89. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969).

90. *Id.* at 1045.

discrimination was unlawful.<sup>91</sup> Later decisions of the federal courts of appeals accepted the view of the law set forth in these first four government cases.

The broad interpretation of Title VII previously adopted by the federal appellate courts was threatened when a divided Fourth Circuit ruled in *Griggs v. Duke Power Co.*<sup>92</sup> that an employer could lawfully require employees to be high school graduates and to pass written "ability" tests before being transferred or hired into previously all-white jobs. Even though these requirements had not been used in the past and thus were not necessary, the court upheld the testing and educational requirements as long as they were applied fairly and their adoption had not been motivated by a racial or other invidious purpose.<sup>93</sup> The suit had been initiated and prosecuted by the NAACP Legal Defense Fund, but the EEOC and the Department of Justice had filed amicus briefs in support of the plaintiffs in the Court of Appeals for the Fourth Circuit.<sup>94</sup> The private plaintiffs responded to the Fourth Circuit's decision by seeking certiorari. The Supreme Court then invited the Solicitor General to set forth the views of the United States.<sup>95</sup> In his response, the Solicitor General urged the Court to grant certiorari and to reverse the Fourth Circuit; he noted the importance of the issue, the conflict of the decision below with EEOC guidelines, and the conflict with the holdings of the three appellate decisions discussed in subpart A. All three of those decisions held that Title VII proscribed not only purposeful discrimination, but also neutral practices that perpetuated the effects of pre-Act discrimination.<sup>96</sup> The Court granted certiorari in June 1970.<sup>97</sup> In a unanimous opinion issued on March 8, 1971, the Supreme Court reversed the Fourth Circuit and held that facially neutral "practices, procedures, or tests" that are discriminatory in ef-

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91. *Local 189 United Papermakers v. United States*, 397 U.S. 919 (1970). *But see International Br'd. of Teamsters v. United States*, 431 U.S. 324 (1977) (holding that seniority systems that perpetuate the effects of pre-Act discrimination are lawful under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1982), unless they are not bona fide).

92. 420 F.2d 1225 (4th Cir. 1970).

93. *Id.* at 1232-33.

94. *See* Brief for the United States, *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970) (No. 13,031) (submitted by attorneys for both the Commission and the Justice Department). The lawyers for the private plaintiffs included J. LeVonne Chambers, now Executive Director of the Legal Defense Fund, and Professor Robert Belton, now a professor at the Vanderbilt University School of Law.

95. *Griggs v. Duke Power Co.*, 399 U.S. 926 (1970).

96. *See supra* notes 84-86 and accompanying text; *see also* Brief for the United States as Amicus Curiae, *Griggs v. Duke Power Co.*, 399 U.S. 926 (1970) (No. 1405). The Solicitor General in particular relied upon the *St. Louis Arch* case, 416 F.2d at 123, which held unlawful the use of a journeyman's test that did not measure the ability of an applicant to do the work usually required of a journeyman. *Id.* at 136.

97. *Griggs*, 399 U.S. at 926.

fect cannot be used to preserve the "status quo" of employment discrimination.<sup>98</sup>

Another issue in *Griggs* was whether the Tower Amendment in section 703(h) of the Civil Rights Act protected the use of tests that had been developed by persons with professional expertise, but that had the consequence of discriminating against minorities. In reviewing the legislative history of the Act, the Court noted that the Guidelines of the EEOC, as an administrative interpretation, were "entitled to great deference."<sup>99</sup> Finding that the Act and its legislative history supported the EEOC's testing guidelines, the Court held that if professionally developed tests do not validly measure abilities, skills, or knowledge necessary for successful performance of the job, then those tests, like other practices that have an adverse impact on equal opportunity in employment and are not required by business necessity, violate Title VII.<sup>100</sup>

## 2. The Philadelphia Plan, Goals, and Timetables

When Richard Nixon assumed the Presidency in 1969, his record of supporting a positive policy designed to achieve nondiscrimination by government contractors and subcontractors was well established.<sup>101</sup> In June 1969, Nixon's Assistant Secretary of Labor Arthur Fletcher soon promulgated the Philadelphia Plan, which required bidders on federally assisted construction contracts in the five county Philadelphia area to set numerical goals for using blacks and other minorities in six building trades.<sup>102</sup> Minorities traditionally had been excluded from the unions and from participation in the trades.<sup>103</sup> A precursor to the Plan,

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98. *Griggs*, 401 U.S. at 430. Chief Justice Burger stated:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

.....  
We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

.....  
But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

*Id.* at 431-32 (emphasis in original).

99. *Id.* at 434.

100. *Id.*

101. See *supra* note 6 and accompanying text.

102. See FINAL REPORT, *supra* note 10.

103. The Philadelphia Plan was quoted and described in Contractor's Association of Eastern

adopted by the Philadelphia Federal Executive Board in November 1967, had required each apparent low bidder to submit a written affirmative action plan assuring minority representation in several building trades.<sup>104</sup> The Comptroller General, however, found this requirement unlawful because a bidder did not know all the obligations before the bid was submitted.<sup>105</sup> After much discussion within both the Labor Department and the Justice Department,<sup>106</sup> the Justice Department finally approved the Philadelphia Plan during the summer of 1969.<sup>107</sup> Debate continued to rage over the Plan, and the building trades unions strongly opposed it. In August 1969, the Comptroller General ruled that the Plan violated Title VII of the Civil Rights Act of 1964.<sup>108</sup>

In response and upon the recommendation of the staff of the Justice Department, Secretary of Labor George Schultz sought a written opinion from the Attorney General. An opinion of the Attorney General on matters of law is binding upon the executive branch unless and until that opinion is overruled in a binding judicial decision.<sup>109</sup> The opinion prepared for Secretary Schultz was drafted under the supervision of Assistant Attorney General William Rehnquist and signed by Attorney General John Mitchell.<sup>110</sup> The opinion stated that the Philadelphia Plan was authorized under Executive Order 11,246 and was lawful under Title VII.<sup>111</sup> As a result, the Plan was implemented in the fall of 1969.

The next attack on the Philadelphia Plan came from Congress,

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Pa. v. Schultz, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

104. See *Contractors Ass'n*, 442 F.2d at 163 n.7.

105. See 48 COMPROLLER GEN. 326 (1968).

106. While Special Assistant for Title VI, my duties included contact with and advice to the civil rights agencies of the executive branch on matters that may or may not have been within the scope of Title VI. In that role I received several telephone calls about the concept and some of the legal issues from then Assistant Solicitor of Labor for Civil Rights James Jones (since 1969 a professor of law at the University of Wisconsin Law School), in which he had raised and discussed the issues with me.

107. Before 1969, the prevailing view in the Civil Rights Division was that race-neutral solutions to problems of discrimination in employment should be exhausted before any race-conscious remedies were sought.

After a discussion of the legal issues with Assistant Attorney General Jerris Leonard and then Deputy Assistant Attorney General David L. Norman in the early summer of 1969, I recall preparing a brief letter of approval for Mr. Leonard's signature. Thereafter Mr. Leonard signed it while sitting at my desk (a visit to my office from the boss was unusual, and his signing it there was highly unusual). While I do not have the letter, my recollection is that it was signed in July 1969.

108. Letter to Secretary of Labor, August 5, 1969, Op. Comptroller Gen., *reprinted in* 115 CONG. REC. 40,019-22 (1969).

109. See 28 U.S.C. § 512 (1982); P. BATOR, D. MELTZER, P. MISKIN, & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 71-72 (3d ed. 1988) [hereinafter HART & WECHSLER'S].

110. 42 Op. Att'y Gen. 405 (1969).

111. *Id.*

where the building trades unions succeeded in persuading the Senate to adopt a rider to an appropriations bill that prevented further implementation of the Plan. President Nixon responded forcefully by noting the incongruity of liberal Democrats supporting this measure and by threatening to veto the appropriations bill.<sup>112</sup> Thereafter, the House deleted the rider from the bill and a majority of the Senate reversed itself and deleted the provision, which allowed the Plan to continue.<sup>113</sup> The Plan next was challenged in the courts. Both the District Court and the Third Circuit, however, upheld the Plan and found that it was authorized by and consistent with both Executive Order 11,246 and Title VII.<sup>114</sup>

The adoption of the Philadelphia Plan by the Department of Labor and support for the Plan from the Attorney General, the President, and the courts had far reaching results. Regional plans like the Philadelphia Plan were adopted by the Department of Labor for building trades in most large metropolitan areas. More significantly, numerical goals and timetables were incorporated into the obligations of industrial and other federal procurement contractors and subcontractors in 1970 by "Order No. 4," which later became a regulation issued by the Secretary of Labor.<sup>115</sup>

### 3. The Department of Justice

The Civil Rights Division of the Justice Department was reorganized on October 6, 1969, from regional (Southern, Central, Western, and Eastern Sections) into functional sections (criminal, education, employment, housing, and voting) probably in part to placate Southern opposition to school desegregation by shifting some of the better known lawyers in the Division from school desegregation to other matters. As a result of the change, however, the Department gave priority to employment discrimination—the Employment Section became the largest in the Division with an authorized strength of twenty-five lawyers—the reorganization encouraged specialization, the development of expertise in certain areas, and planning along functional lines. In light of the clarifications of the law already obtained in appellate decisions, the Department shifted its emphasis from simply obtaining rulings on the substantive obligations of the law to more effective relief and greater coverage under employment discrimination laws.<sup>116</sup>

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112. See 115 CONG. REC. 17,204-06 (1969).

113. *Id.*

114. *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

115. 41 C.F.R. pt. 60-2 (1988).

116. These statements are based upon the observations and memory of the Author. The com-

The government sought back pay in employment discrimination suits for the first time in the fall of 1969 in order to provide employers with an incentive to come promptly into compliance with the law.<sup>117</sup> Having approved the imposition of goals and timetables in the Philadelphia Plan even absent a judicial finding of discrimination, the Justice Department began in the fall of 1969 to seek relief in the form of goals and timetables on a regular basis as a part of judicial decrees entered by consent or after litigation.<sup>118</sup>

With the unanimous decision of the Supreme Court in *Griggs v. Duke Power Co.*,<sup>119</sup> the initial work of securing interpretation of the substantive provisions of Title VII was complete. The Justice Department's equal employment opportunity litigation program next sought to secure precedents for effective remedies and broad impact.

#### 4. The Equal Employment Opportunity Act of 1972

The Supreme Court issued the *Griggs* decision while Congress was considering the Equal Employment Opportunity Act of 1972. Congressional proponents of the Act received *Griggs* with enthusiasm.<sup>120</sup> Similarly, the proponents of the legislation cited and relied upon the decision in the Philadelphia Plan case<sup>121</sup> to defeat efforts to amend the Act by restricting or prohibiting the Department of Labor and the EEOC from using numerical remedies. Senator Jacob Javits even in-

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mission by which Attorney General Mitchell appointed the Author to the position of Chief, Employment Section, Civil Rights Division, is dated October 6, 1969.

117. The first request was made and authorization given in a case in which the district court's denial of a preliminary injunction had resulted in continuation for over a year of practices found by the court to be unlawful. See *United States v. Hayes Int'l Corp.*, 456 F.2d 112 (5th Cir. 1972) (finding for the United States on the merits); *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969) (denying the United States request for a preliminary injunction).

118. Numerical relief in the form of referrals had been sought and obtained in *Local 53, International Association Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), but that case was viewed within the Division as an exception warranted by the particularly harsh discrimination shown by the record. The first fruit of the new policy seeking more impact and clearer relief was in the Seattle building trades suit against five unions in the Seattle area, which was brought in the fall of 1969, and in which relief was obtained in June 1970 against all five of the unions and their apprenticeship programs. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *aff'g* 315 F. Supp. 1202 (W.D. Wash. 1970), *cert. denied*, 404 U.S. 984 (1971).

119. See *supra* notes 92-100 and accompanying text.

120. Both committee reports endorsed its reasoning and holding, and sought to extend its benefits to all applicants for employment and to employees in state and local governments and in the federal government. S. REP. NO. 415, *supra* note 55, at 5 n.1, 14-15; H.R. REP. NO. 238, 92d Cong., 1st Sess. 17-18, 20-22 (1971) [hereinafter H.R. REP. NO. 238].

121. *Contractors Ass'n*, 442 F.2d at 159. Congressional proponents of the Act also relied upon the decisions in the Seattle Building Trades case, *Ironworkers Local 86*, 443 F.2d at 544. See 116 CONG. REC. 693-704 (1972). Senator Javits argued from each of the decisions and had them inserted in full into the Congressional Record in his successful efforts to defeat the Ervin amendment. *Id.*

serted into the Congressional Record the press release of a settlement with the Justice Department that included back pay and a twenty percent hiring goal.<sup>122</sup> Indeed, appellate courts repeatedly had approved the use of numerical goals and back pay as a part of the relief to be granted in suits brought by the government or suits in which the government participated as amicus.<sup>123</sup>

#### 5. 1972-1975

Perhaps the greatest accomplishments by the government in the field of equal employment opportunity occurred during the years 1972 through 1975. For example, the EEOC's efforts to bring the Bell System's employment practices before the Federal Communications Commission in 1973 led to a consent decree with American Telephone & Telegraph (AT&T) under which over thirty-one million dollars in back pay was awarded to employees.<sup>124</sup> While this award was modest in the amount paid per person, the size of the suit, covering over 500,000 employees, and the size of the award captured the attention of businessmen across the country. Successful suits by the Department of Justice against Bethlehem Steel and United States Steel were followed by a nationwide suit in 1974 against the entire basic steel industry, which covered more than 700,000 employees.<sup>125</sup> Similarly, successful suits by the Department against a number of trucking companies led to a nationwide suit against a defendant class of over 250 trucking companies in that same year and a consent decree against the employers.<sup>126</sup> These three suits combined brought over two million employees under the coverage of consent decrees with goals, timetables, and back pay. The suits in the steel and trucking industries, following on the heels of the *A.T. & T.* case, led to fear in the business community that, unless the equal employment opportunity problems received prompt attention and were remedied, major litigation with a high risk of bad publicity and

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122. 116 CONG. REC. 705 (1972).

123. For examples of numerical goals, see *Carter v. Gallagher*, 452 F.2d 315 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972) (the United States intervened prior to rehearing in the court of appeals by filing an amicus curiae brief); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (the United States participated as amicus); and *Ironworkers Local 86*, 443 F.2d at 544. For cases approving back pay, see *United States v. N.L. Industries*, 479 F.2d 354 (8th Cir. 1973); and *Hayes International Corp.*, 456 F.2d at 121.

124. See *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom. Communications Workers of Am. v. EEOC*, 438 U.S. 915 (1978).

125. *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom. NOW v. United States*, 425 U.S. 944 (1976). Predecessor suits were *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971), and *United States v. United States Steel Corp.*, 5 Empl. Prac. Dec. (CCH) ¶ 8619, at 7814 (N.D. Ala. 1973).

126. See *In re Trucking Indus. Employment Practices Litig.*, 384 F. Supp. 614 (J.P.M.L. 1974).

large back pay awards would follow.

During this period substantial movement and enforcement occurred in the contract compliance program. After the Philadelphia Plan was sustained in the Congress and in the courts,<sup>127</sup> the federal government incorporated goals and timetables formally into the obligations of employers who had federal contracts or subcontracts. These employers included most large corporations and many smaller ones.<sup>128</sup> Moreover, the clarification of the law on testing and the apparent clarification of the law on seniority systems, plus the examples of *A.T. & T.* and the steel industry consent decree, gave the Office of Contract Compliance Programs the power to obtain employer agreement to systematic changes in employment structures that previously had denied opportunities to minorities and women.

The first ten years of Title VII were capped by the decision of the Supreme Court in *Albemarle Paper Co. v. Moody*<sup>129</sup> in June 1975. In that private suit, the District Court denied an awarding of back pay on the ground that the defendants' actions were not grounded on bad faith or bad motives.<sup>130</sup> The court also held lawful two ability tests, which purportedly had been proven valid on the eve of litigation.<sup>131</sup> A divided Court of Appeals for the Fourth Circuit reversed on both grounds.<sup>132</sup> The government filed amicus briefs in both the appeals court and later in the Supreme Court and urged that back pay should be awarded under Title VII in order to make the plaintiff whole.<sup>133</sup> The government also argued that the EEOC guidelines expressed the standards of the profession and should be followed in determining whether written tests had been validated properly.<sup>134</sup> The Supreme Court agreed.<sup>135</sup> On the issue of back pay, the Court, citing *Griggs*, held that a district court must exercise its discretion in light of the purposes of the Act and that one of the basic purposes of the Act was to remove barriers that have

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127. *Contractors Ass'n*, 442 F.2d at 159.

128. *See supra* note 96.

129. 422 U.S. 405 (1975).

130. *See id.* at 410.

131. *See id.* at 410-11.

132. *Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973). The Fourth Circuit had granted a petition for rehearing en banc, and heard oral argument on it, but later denied the petition after the Supreme Court ruled, on a certified question, that senior circuit judges who were originally assigned to hear a case are not authorized by Congress to participate in a decision to rehear the case en banc. *See Albemarle Paper Co. v. Moody*, 417 U.S. 622 (1974); *see also Moody*, 422 U.S. at 413 n.5.

133. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (No. 74-389, O.T. 1974).

134. *Moody*, 422 U.S. at 405.

135. *See id.* at 418, 430-31.

operated in the past to favor white employees over other employees.<sup>136</sup>

On the issue of the proper standard for the use of professionally developed tests, the Court noted, again citing *Griggs*, that the employer must show that an employment test bears a "manifest relationship to the employment in question."<sup>137</sup> Accordingly, the Court affirmed the two major holdings of the Fourth Circuit and confirmed the obligations of district courts: To grant back pay when there have been violations of the Act without racial or other invidious purposes; and to hold tests that have a discriminatory impact unlawful absent proof from the employer that the tests meet professionally acceptable standards.

### C. *The Middle Years (1975-1982)*

In the years after the *Albemarle* decision there occurred consolidation, continued enforcement, and relatively little change in the structure of employment discrimination law. Although the Supreme Court handed civil rights proponents their first major defeat under Title VII in 1977,<sup>138</sup> that decision had little prospective application. In affirming a finding of liability, the Court incorporated into Title VII the principle that gross statistical disparities between the available labor market and the work force of the employer constituted prima facie evidence of purposeful discrimination.<sup>139</sup> The decisions of the Court generally continued to interpret Title VII in a manner consistent with the congressional

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136. See *id.* at 417. The Court then noted the connection between back pay and the removal of these barriers:

Back pay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a back pay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

*Id.* at 417-18 (quoting *United States v. N.L. Indus.*, 479 F.2d 354, 379 (8th Cir. 1973)).

137. *Id.* at 425 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)). The Court continued:

The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

*Id.* at 431 (quoting 29 C.F.R. § 1607.4(c) (1971)).

138. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 334-42 (1977). The issue in *Teamsters* was whether seniority systems that perpetuated the effects of pre-Act discrimination were lawful under § 703(h) of Title VII. As previously noted, by 1977 most industries already had adopted transfer provisions permitting blacks to transfer to white jobs without loss of seniority under the rulings of the eight courts of appeals that such systems were unlawful. See *Chambers & Goldstein*, *supra* note 17, at 246-47.

139. *Teamsters*, 431 U.S. at 334-41. The ruling on the use of statistics was confirmed and refined shortly thereafter in *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

purposes.<sup>140</sup>

The Court, however, gave a restrictive interpretation to the sex discrimination provisions of Title VII by ruling that discrimination on the grounds of pregnancy was not sex discrimination.<sup>141</sup>

Congress responded with the Pregnancy Discrimination Act of 1978, which amended Title VII to include "pregnancy, childbirth, or related medical conditions" within the meaning of "because of sex" or "on the basis of sex."<sup>142</sup> Congress thus made it clear that practices which discriminated on the basis of pregnancy or childbirth were prohibited by Title VII.<sup>143</sup>

During the mid-1970s, the federal government coordinated its efforts to ensure nondiscrimination in employment. In 1978, the five federal agencies with enforcement responsibilities under federal equal employment opportunity law adopted the Uniform Guidelines on Employee Selection Procedures, which were applicable to the United States as an employer as well as to private, and state and local government employers.<sup>144</sup> These Guidelines provided employers, the psychological profession, and the courts with uniform federal guidance on the kind of evidence necessary to validate a test or other selection procedure.

Under President Carter's Reorganization Plan Number 1 of 1978, the EEOC gained "lead agency" status in efforts to combat discrimination in employment. The EEOC was given the responsibility to coordinate all equal employment opportunity matters, as well as responsibility for enforcement of the Age Discrimination in Employment Act and the Equal Pay Act.<sup>145</sup> In addition, the EEOC was given responsibility for adopting regulations to govern equal employment opportunity plans for federal agencies, as required by section 717(b) of the

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140. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (holding unlawful height and weight requirements that disproportionately screened women out of prison guard jobs); *Hazelwood*, 433 U.S. at 299 (sustaining the use of statistics showing a gross disparity between the available labor market and the work force of the employer as prima facie evidence of purposeful discrimination).

141. *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977).

142. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)).

143. *Id.* See generally *California Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272 (1987); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

144. See 29 C.F.R. pt. 1607 (1988); see also 5 C.F.R. § 300.103(c) (1988) (regulations of Office of Personnel Management); 28 C.F.R. § 50.14 (1988) (regulations of Justice Department); 29 C.F.R. pt. 1607 (1988) (EEOC Guidelines); 31 C.F.R. § 51.53 (1988) (regulations of Treasury Department); 41 C.F.R. pt. 60-3 (1988) (regulations of Labor Department). The regulations of the Treasury Department were issued under the Revenue Sharing Act.

145. Reorg. Plan No. 1 of 1978, 3 C.F.R. pt. 321 (1978), *reprinted in* 5 U.S.C. app. at 1155 (1982), *and in* 92 Stat. 3781 (1978); see also Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705 (ratifying all reorganization plans).

Civil Rights Act, and responsibility for final administrative decisions in charges filed under that section against federal agencies by applicants or employees.<sup>146</sup> The EEOC used its authority to adopt affirmative action guidelines in 1979 which, combined with the decision in *United Steelworkers of America v. Weber*,<sup>147</sup> left private employers free to adopt affirmative action programs with relatively little fear of financial liability under Title VII for programs that favored blacks or women.<sup>148</sup>

The Equal Employment Opportunity Act of 1972 amended Title VII by extending its coverage to state and local governments and to the federal government itself, and by granting the EEOC the authority to bring its own suits. Originally, the House committee had recommended that all equal employment opportunity functions be granted to the EEOC, including those of the Civil Service Commission and the Department of Labor under Executive Order 11,246. That proposal presumably was intended to placate business interests disturbed that the committees sought to vest the cease and desist authority in the Commission.

As has been noted previously,<sup>149</sup> however, the Republican party in Congress, as well as the Nixon Administration, continued to oppose cease and desist authority and the transfer of the executive order program to the Commission. The procedural compromise therefore was to grant the EEOC judicial enforcement authority, rather than cease and desist power, allowing the executive order program to remain at the Department of Labor.<sup>150</sup> One provision of the Act transferred to the EEOC in two years the Attorney General's functions of bringing pattern or practice suits against private employers and unions unless the President submitted and neither House of Congress vetoed a reorganization plan under the Reorganization Act.<sup>151</sup> This provision in particular was supported by the building trades unions and the civil rights leadership.<sup>152</sup> Following the passage of the 1972 Act, President Nixon became

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146. Reorg. Plan No. 1 of 1978, *supra* note 145.

147. 443 U.S. 193 (1979).

148. The guidelines are found at 29 C.F.R. pt. 1608 (1988) (effective February 20, 1979). They were adopted under § 713 of the Act, which protects employers from liability or punishment under any actions taken in reliance upon any written interpretation or opinion of the Commission. 42 U.S.C. § 2000e-12(b) (1982). *See generally Weber*, 443 U.S. at 193. In addition, the Department of Labor continued its enforcement of Executive Order 11,246, and commenced a number of administrative proceedings, particularly in the banking industry.

149. *See* Debate on Amendment No. 611, 118 CONG. REC. 686-690 (1972).

150. *See* 118 CONG. REC. 3965-66, 3973, 3975 (1972).

151. The Civil Rights Act of 1964, tit. VII, § 707(c), 42 U.S.C. § 2000e-6(c) (1982).

152. The building trades unions, particularly the electricians, ironworkers, plumbers and pipefitters, operating engineers and sheet metal workers, had been sued repeatedly and successfully by the Justice Department and were pleased to see the Department's authority to sue removed. The civil rights leadership, under the guidance of Clarence Mitchell, held steadfast to its

enmeshed in the Watergate investigation, and in 1973 the Congress declined to renew the provisions of the Reorganization Act. Accordingly, no reorganization plan was submitted, and the authority of the Attorney General was "transferred" to the EEOC in March 1974, as was the authority to prosecute the Title VII cases that previously had been brought by the Department of Justice.

Along with its enhanced responsibilities, the EEOC continued to receive many more charges than it was able to handle, so that by 1979 its backlog of unprocessed charges had risen to 70,000.<sup>153</sup> While in its formative years the EEOC used the number of charges and the backlog to seek and obtain greater resources, by 1975 the backlog and the resulting delays had become an embarrassment. The General Accounting Office issued a report in 1976 that found severe management problems within the EEOC. Specifically, the report found that the EEOC had not been able to resolve most of its charges in a timely fashion, and that most charges were closed administratively without investigation, without enforcement action, and without a finding of no cause.<sup>154</sup> Thus, the backlog became the driving force for most of the EEOC's reorganization and new procedures.

Under the leadership of Eleanor Holmes Norton in the late 1970s, the Commission adopted a number of procedural reforms to expedite the processing of charges, including the "rapid charge process" and the placement of lawyers from the Office of General Counsel in district offices to work with equal employment opportunity specialists under the supervision of district directors. She also directed the creation of systemic discrimination units within each district office and an early litigation identification program.<sup>155</sup> These reforms sharply reduced the backlog.<sup>156</sup>

As a result of these reforms, however, most charges of discrimination were investigated only to ascertain the rights of the individual con-

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ideal of a strong Commission that would be responsive to its wishes. *See supra* notes 61, 62.

153. Although it anticipated receiving 2000 charges in its first year, it received 8854. The number of charges received rose to 12,148 in 1969 and to 71,023 in 1975. *See Belton, supra* note 73, at 921. By January 1979, the "backlog" had reached almost 70,000 charges. *See Oversight Hearings on Equal Employment Opportunity and Affirmative Action: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 97th Cong., 1st Sess. 336 (1981) [hereinafter Oversight Hearings]* (statement of J. Clay Smith, Jr., Acting Chairperson, EEOC).

154. *Report of the General Accounting Office (1976), cited in GENERAL ACCOUNTING OFFICE, FURTHER IMPROVEMENTS NEEDED IN EEOC ENFORCEMENT ACTIVITIES (April 9, 1981) [hereinafter GAO REPORT]*.

155. The reforms are summarized in the report of the General Accounting Office. GAO REPORT, *supra* note 154, at 4-10.

156. By the fall of 1981, the backlog had been reduced from almost 70,000 charges to less than 24,000. *See Oversight Hearings, supra* note 153, at 336 (Smith Testimony).

cerned, and the EEOC adopted a directive precluding its investigators from examining the broader or classwide implications of a charge, except for those charges designated for either systemic investigation or the early litigation program.<sup>157</sup> By 1981, with the systemic discrimination program barely off the ground, the EEOC issued its first seven systemic discrimination charge "reasonable cause" decisions.<sup>158</sup> Thus, in nine years after it had received litigation authority and seven years after that authority had become exclusive, the EEOC had filed only one systemic suit under Title VII.<sup>159</sup>

In 1979 the EEOC filed its first systemic discrimination suit: A nationwide sex discrimination suit against Sears, Roebuck, & Co. In addition, the EEOC brought suits against Sears alleging racially discriminatory practices at stores in specified locations in Alabama, Georgia, and New York. The EEOC's suits against Sears got off to a rocky start. Sears contended that since 1973 the EEOC investigation had been inspired and directed by a high-ranking lawyer who was a member of the National Organization for Women (NOW).<sup>160</sup> Sears also alleged that this lawyer prosecuted the matter internally within the EEOC and even drafted the regulations that governed how conciliation was to be conducted.<sup>161</sup> Sears argued that the suits should be dismissed because of the lawyer's potential conflict of interest and because of the EEOC's insistence that negotiation concerning the local racial matters

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157. See GAO REPORT, *supra* note 154, at 9-10.

158. See *Oversight Hearings*, *supra* note 153, at 336 (Smith Testimony). One cannot tell from the testimony whether these seven decisions included any of the five major respondents targeted by Chairperson Brown in 1973, or included matters arising under the Age Discrimination Act or the Equal Pay Act.

159. The only systemic suit filed under Title VII prior to 1981 was the Sears, Roebuck & Co. litigation. See *infra* notes 160-66 and accompanying text. After it received litigation responsibility in 1972, the EEOC in 1973 commenced a number of investigations by filing Commissioner charges against four of the largest employers in the country—Ford Motor Co., General Electric, General Motors, Sears, Roebuck & Co.—and against the International Brotherhood of Electrical Workers (IBEW). With the exception of the IBEW, many of whose locals had been found in violation of the Act, the targets seem to have been selected primarily on the basis of size, since several of them had relatively excellent reputations for equal employment opportunity practices. Notwithstanding the provisions of § 709(c) prohibiting disclosure of information gained through investigations, the charges resulted in a great deal of publicity that led many people to believe that suits had been brought against these employers. However, no suits were ever brought against the other four targets. Although suits were never filed against either General Electric or General Motors, the Commission has noted under the heading "Monetary Relief Thru [sic] Litigation" recovery of \$29.4 million against General Electric in fiscal year 1978, accounting for most (84%) of the \$34 million asserted recovery through litigation in that fiscal year. It noted recovery of \$42.5 million from General Motors in fiscal year 1984, accounting for approximately 40% of the amount secured through "compliance" in that year. See *Thomas 1986 Nomination Hearings*, *infra* note 205, at 7.

160. *EEOC v. Sears, Roebuck & Co.*, 504 F. Supp. 241, 246 (N.D. Ill. 1980), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

161. *Id.* at 246-47.

must include the national sex discrimination charges.<sup>162</sup>

Two of the small suits involving specific stores were dismissed because of the Commission's failure to conduct separate negotiations about them.<sup>163</sup> The nationwide suit, however, was not dismissed. The District Court believed that the "extreme sanction" of dismissal was unnecessary because the facts would be tried *de novo* before the court.<sup>164</sup> Furthermore, the court ruled that the real parties in interest should not suffer because of the derelictions of the Commission.<sup>165</sup> The District Court, however, found that a serious conflict of interest existed and that the EEOC had erred in allowing the lawyer to continue to manage the matter after directing him to resign from NOW, rather than transferring the case to another lawyer.<sup>166</sup>

From 1975 through 1982, the Department of Justice brought numerous suits, particularly pattern or practice suits, against state and local governments. These suits tended to cover all recruitment and hiring practices, and sometimes covered promotion practices as well. Two of these suits resulted in decrees covering all the agencies of a state.<sup>167</sup> Other decrees reached all or most of the police and fire departments in a state.<sup>168</sup> Others covered a majority of the police and fire departments of the state's major cities.<sup>169</sup> In addition, nine state police agencies were sued from 1974 through 1982 and decrees were obtained in all of them.<sup>170</sup>

The testimony of Assistant Attorney General William Bradford Reynolds before the Subcommittee on Employment Opportunities of the House Education and Labor Committee foreshadowed the Reagan Administration's commitment to equal employment opportunity. Reyn-

162. *Id.* at 249, 262-63.

163. *EEOC v. Sears, Roebuck & Co.*, 23 Emp. Prac. Dec. (CCH) ¶ 31,065 (S.D.N.Y. 1980), *aff'd*, 650 F.2d 14 (2d Cir. 1981); *EEOC v. Sears, Roebuck & Co.*, 23 Emp. Prac. Dec. (CCH) ¶ 31,066 (M.D. Ala. 1980).

164. *Sears*, 504 F. Supp. at 251-53.

165. *Id.* at 253.

166. *Id.* at 250.

167. *See NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974) (covering Alabama state police); *see also United States v. Frazer*, 14 Emp. Prac. Dec. (CCH) ¶ 7599 (M.D. Ala. 1976) (covering all Alabama agencies except the state police).

168. *See United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980) (covering 45 municipal police and fire departments in Louisiana); *see also Vulcan Pioneers, Inc. v. New Jersey*, 832 F.2d 811 (3d Cir. 1987) (covering 12 fire departments in New Jersey).

169. *See United States v. City of Chicago*, 549 F.2d 415 (7th Cir.) (police department), *cert. denied*, 434 U.S. 875 (1977); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 1017 (1st Cir. 1974) (fire department), *cert. denied*, 421 U.S. 910 (1975).

170. *See United States v. Virginia*, 620 F.2d 1018 (4th Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States v. North Carolina*, 587 F.2d 625 (4th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *United States v. New York*, 475 F. Supp. 1103 (N.D.N.Y. 1979). Other state police agencies sued in this period were Florida, Maryland, Michigan, New Hampshire, New Jersey, and Vermont.

olds announced that the Department of Justice would no longer insist upon or support hiring or promotion goals.<sup>171</sup> Reynolds, however, pledged a vigorous program to enforce the federal equal employment opportunity law as it had been interpreted to date, including the adverse impact ruling in *Griggs*.<sup>172</sup> He summarized the policy of the Department as a "three-pronged remedial formula" aimed at: (1) "specific affirmative relief" for victims of discrimination; (2) "increased recruitment efforts aimed at . . . group[s] previously disadvantaged"; and (3) color-blind and sex neutral "nondiscriminatory future hiring and promotion practices."<sup>173</sup>

In apparent contrast to Reynolds's testimony, J. Clay Smith, Jr., Acting Chairperson of the EEOC, testified before the same Subcommittee and made clear the EEOC's adherence to the concept of affirmative action, including hiring and promotion goals, as interpreted by nine of the courts of appeals.<sup>174</sup> He also supported and explained the affirmative action guidelines previously adopted by the EEOC.<sup>175</sup> Similarly, the Director of the Office of Contract Compliance explained to the Subcommittee modified approaches to enforcement of Executive Order 11,246, but advocated further adherence to the overall scheme of self-imposed goals and timetables to correct for underutilization.<sup>176</sup>

Thus, while the nature of decrees sought and obtained by the Justice Department changed during the first years of the Reagan Administration, enforcement of the law as it had been interpreted previously continued and there was little or no change in the stated policy or direction at the EEOC or the Department of Labor.

#### D. The Later Years (1983-1988)

In January 1983, the Civil Rights Division of the Justice Department filed an amicus brief in *Williams v. City of New Orleans*,<sup>177</sup> a private suit against the New Orleans police department, and argued that racial goals or quotas are unlawful under Title VII.<sup>178</sup> Like an earlier brief filed in *Bob Jones University v. United States*,<sup>179</sup> the brief in

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171. See *Oversight Hearings*, *supra* note 153, at 136-39 (testimony of William Bradford Reynolds, Assistant Attorney General for Civil Rights).

172. *Id.* at 133-34.

173. *Id.* at 138-39.

174. See *id.* at 336 (Smith Testimony).

175. *Id.* at 328-29.

176. See *id.* at 406-07 (letter to Ellen M. Shong, Director, Office of Federal Contract Compliance Programs).

177. 729 F.2d 1554 (5th Cir. 1984).

178. Motion of the United States to Intervene and Suggestion for Rehearing En Banc, *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984).

179. 461 U.S. 574 (1983). The Department of Justice had filed a Brief in the *Bob Jones*

*Williams* was drafted by noncareer Justice Department lawyers without consultation or advice from lawyers who had been in the Department prior to 1981. While the District Court had ruled in favor of the Justice Department's position and refused to accept a one-for-one promotion quota in a consent decree, the Justice Department's brief for appeal went well beyond that issue and argued that no affirmative action remedies are lawful under Title VII to correct for past discrimination, except those designed to assist the identified victims of discrimination.<sup>180</sup> The Fifth Circuit adhered to its own precedent<sup>181</sup> and rejected this position, though the court adopted the result that the Department had sought—rejection of the one-for-one promotion quota of the consent decree.<sup>182</sup>

The brief in *Williams* established the de facto administrative primacy of the Justice Department in employment discrimination matters. The EEOC had not been consulted about the brief. If the position of the Justice Department had been accepted by the courts, the EEOC's affirmative action guidelines and many of the EEOC's conciliation agreements, consent decrees, and adjudicated decrees (including many to which the Justice Department was still a party) would have been ruled unlawful. Although the EEOC Commissioners, including Chairperson Clarence Thomas, challenged the Justice Department's brief as a derogation of the Commission's authority as chief interpreter of Title VII, the EEOC did not file a contrary brief.<sup>183</sup>

The Justice Department followed its brief in *Williams* with a brief in *Firefighters Local Union No. 1784 v. Stotts*.<sup>184</sup> A court order had

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*University* case in 1982, which not only changed the position taken by the government over the years, and earlier in that case, but also urged the Court to hold unlawful a revenue ruling of the Internal Revenue Service which denied tax exempt status to institutions that discriminated against blacks or others on grounds of race, on the grounds that they were not charitable within the meaning of the Code. Assistant Attorney General Reynolds signed that brief and argued the case orally for the government. See Brief of the United States, *Bob Jones University v. United States*, No. 81-1 O.T. 1982, 81-3 O.T. 1982 (1982).

180. See *Williams*, 729 F.2d at 1557.

181. The Fifth Circuit had ruled to the contrary at least implicitly more than 10 years earlier and had reaffirmed that holding in 1981. See *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974); *Morrow v. Crisler*, 491 F.2d 1053 (5th Cir. 1974) (en banc); see also *United States v. City of Miami*, 614 F.2d 1322, 1335 (5th Cir. 1980), *aff'd in part, vacated and remanded in part on other grounds*, 664 F.2d 435 (5th Cir. 1981) (en banc).

182. *Williams*, 729 F.2d at 1554. The Supreme Court had rejected the government's position in the *Bob Jones University* case. See *supra* note 179. It also declined the Justice Department's suggestions that the Court review the affirmative action requirements of decrees in Detroit and Boston. After denial of certiorari in *Bratton v. City of Detroit*, 464 U.S. 1040 (1984) and in *Boston Firefighters Union v. Boston Chapter*, 461 U.S. 477 (1983) the Court remanded the case for consideration of mootness.

183. Chambers & Goldstein, *supra* note 17, at 253-54.

184. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

required the City of Memphis to lay off more senior whites and retain more junior blacks. The government's brief on appeal to the Supreme Court urged the Court to overrule a court-ordered racial override of the last-in-first-out seniority provisions of a collective bargaining agreement. Though less strident in tone than the brief in *Williams*, the *Stotts* brief ranged more broadly than necessary to determine the question at hand.<sup>185</sup> The brief argued that the court order was inconsistent with the last sentence of section 706(g) of the Civil Rights Act of 1964 in this case and cited legislative history that suggested such an order was inconsistent with that sentence in all cases.<sup>186</sup> In addition, the government raised the question of whether any race-conscious order by a federal court would be constitutional.<sup>187</sup>

After the Supreme Court struck down the court order in *Stotts*,<sup>188</sup> Justice Department officials announced that the decision had sounded the death knell for race-conscious affirmative action and began a systematic effort to revise consent decrees with approximately fifty-one public employers in order to eliminate their numerical goals.<sup>189</sup> Thereafter, in numerous speeches and briefs, the Justice Department officials argued strenuously on both constitutional and statutory grounds against race-conscious relief in Title VII cases, race- or sex-conscious voluntary affirmative action plans, and race- or sex-conscious goals or set-asides in government contracting.<sup>190</sup> Moreover, the Department filed a number of other briefs siding with employers on questions such as: Whether Title VII preempted provisions of a state law that offered greater protections to pregnant workers than Title VII,<sup>191</sup> and whether the discriminatory impact principles from *Griggs*<sup>192</sup> applied to subjec-

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185. Brief for the United States as Amicus Curiae, *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (Nos. 82-206, 82-229).

186. *Id.* at 23-29.

187. *Id.* at 29-31.

188. *Stotts*, 467 U.S. at 561.

189. See Statement of Assistant Attorney General Reynolds before the National Foundation for the Study of Equal Employment Policy (Nov. 14, 1984), *quoted in* Chambers & Goldstein, *supra* note 17, at 252. The program was covered not only by the media in the communities involved, but also received attention nationally.

190. See, e.g., Brief for the United States as Amicus Curiae, *Wygant v. Jackson Bd. of Educ.*, 478 U.S. 1014 (1985) (No. 84-1340); Brief for the United States as Amicus Curiae, *Local No. 93, Int'l Assoc. of Firefighters v. Cleveland*, 478 U.S. 501 (1985) (No. 84-1999); Brief for the United States as Amicus Curiae, *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421 (1986) (No. 84-1656); Brief for the United States as Amicus Curiae in Support of Petitioners, *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (No. 85-1129); Brief for the United States as Amicus Curiae, *United States v. Paradise*, 480 U.S. 149 (1987) (No. 85-999).

191. See, e.g., Brief for the United States, *Miller-Wohl Co., Inc. v. Commissioner*, 474 U.S. 1045 (1986) (No. 84-1545); Brief for the United States as Amicus Curiae in Support of Petitioners, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494).

192. See *supra* notes 98-100 and accompanying text.

tive employment practices.<sup>193</sup>

The Justice Department briefs in these cases made no reference to nor did they rely upon the applicable regulations or guidelines of the agencies charged with administering federal equal employment opportunity law. For example, the Justice Department brief on the lawfulness of voluntary affirmative action under Title VII in *Johnson v. Transportation Agency*<sup>194</sup> not only failed to mention the affirmative action regulations of the Department of Labor, but also failed to mention the affirmative action guidelines of the EEOC, the Uniform Guidelines of the Justice Department, and the Guidelines of the EEOC. The two latter guidelines encouraged voluntary affirmative action and were expressly applicable under Title VII to state and local governments.<sup>195</sup>

The Justice Department also argued, notwithstanding the express provisions of section 708 of the Act, that Title VII preempts state laws that prohibit dismissing women as a result of pregnancy (or temporary disability due to pregnancy) because Title VII as amended by the Pregnancy Discrimination Act requires that pregnant women be treated no differently than other workers with disabilities.<sup>196</sup> The Justice Department, however, failed to discuss or even to cite the provision of the EEOC guidelines that expressly stated: "A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth, or related medical conditions is in prima facie violation of Title VII."<sup>197</sup> Similarly, in arguing that the adverse impact branch of Title VII does not apply to "subjective" practices, the Justice Department alluded to its Uniform Guidelines—which expressly included all kinds of selection procedures and did not grant an exception or special treatment to subjective practices—and stated simply that the Guidelines did not require the validation of all selection procedures.<sup>198</sup> The Department did not otherwise

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193. Brief for the United States, *Watson v. Ft. Worth Bank & Trust Co.*, 108 S. Ct. 2777 (1988) (No. 86-6139).

194. 480 U.S. 616 (1987).

195. Brief, *Johnson*, 480 U.S. at 616 (table of authorities III-V). EEOC's affirmative action guidelines are found at 29 C.F.R. § 1608 (1988). See also Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.13 (1988).

196. Section 709 is found at 42 U.S.C. § 2000e-7 (1982); see Brief, *Miller-Wohl*, 474 U.S. at 1045; Brief, *Guerra*, 479 U.S. at 272.

197. 29 C.F.R. § 1604.10(a) (1988).

198. The Brief in *Guerra* argued that the adverse impact principle of Title VII does not apply to matters of pregnancy discrimination after the adoption of the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978). Although in doing so it did make reference to 29 C.F.R. § 1604.10(c) (1988), which had been adopted by EEOC before that Act and left unchanged thereafter, and asserted a conflict between that provision and the "Questions and Answers on the Pregnancy Discrimination Act" of EEOC that appear as an appendix to 29 C.F.R. § 1604.10. See Brief at 24 n.12, *Guerra*, 479 U.S. 272. No reference is made in that discussion about the possibil-

attempt to reconcile the position in its brief with the regulations of the Department and the Guidelines of the EEOC.<sup>199</sup>

Thus, the Justice Department during these years approached equal employment opportunity issues in court as if the regulations and guidelines adopted by the agencies charged with administering equal employment opportunity law did not exist, or at least were not binding upon the government. That approach reflected an apparently conscious decision by the Reagan Administration to seek change in civil rights law through the courts, rather than through acts of Congress or changes in agency regulations and guidelines.

While the Supreme Court did not make the sweeping changes urged by Justice Department,<sup>200</sup> the cumulative effect of the Justice Department's positions was that the lawyers for the executive branch, who had been in the forefront of advocating the civil rights of blacks, other minorities, and women since the days of President Truman,<sup>201</sup> became the advocates for a restrictive interpretation of the civil rights laws.

The roles of the EEOC and the Department of Labor were diminished during this period. The EEOC continued to endure problems in processing employment discrimination charges. The number of employment discrimination charges received by the EEOC under Title VII peaked in fiscal year 1977 at 57,562; the addition of the charges under the Age Act and the Equal Pay Act did not result in a big increase in the number of charges filed. From fiscal year 1982 through 1985, the number of charges received each year ranged from 50,935 to 67,119.<sup>202</sup> Nevertheless, under Chairperson Thomas's leadership, the backlog of charges more than thirty months old began to grow again. The number of cases in the backlog grew from 33,417 in 1982 to 44,918 in 1985, and then to 61,000 at the end of fiscal year 1987.<sup>203</sup> Yet the EEOC had grown from an average strength of 2470 employees in fiscal year 1977 to 3097 in 1985. By the end of fiscal year 1987, the number of charges still unprocessed after three hundred days grew to twenty-six percent of the EEOC's inventory of charges.<sup>204</sup> Senator Strom Thurmond asked the General Accounting Office (GAO) to conduct an audit of the EEOC's management and financial problems in July 1981. According to the Sen-

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ity that the guideline was left unaffected by the "Questions and Answers" because they were only addressed to the additional obligations imposed by the Pregnancy Discrimination Act. *See id.*

199. The Author's views are set forth more fully in Rose, *Subjective Employment Practices: Does the Discriminatory Impact Analysis Apply?*, 25 SAN DIEGO L. REV. 63, 87-93 (1988).

200. *See supra* notes 190-93 (citing decisions of the Supreme Court).

201. *See supra* note 6.

202. *See Thomas 1986 Nomination Hearing, infra* note 205, at 79 n.157 (containing chart).

203. *Id.*; *see also* 134 CONG. REC. S16,708 (daily ed. Oct. 18, 1988).

204. 134 CONG. REC. S 16, 708 (daily ed. Oct. 18, 1988).

ator, the GAO found the EEOC in "financial chaos."<sup>205</sup>

Clarence Thomas became Chairperson of the EEOC in May 1982. Thomas devoted substantial time and effort in his first two years as the head of the EEOC to rectifying the bookkeeping and other financial problems of the Commission. When he testified at his confirmation hearing in 1982, he stated that goals and timetables are necessary to monitor progress, and he initially resisted the efforts of the Justice Department to file a brief challenging the lawfulness of goals and timetables under Title VII in *Williams*.<sup>206</sup> By 1984, apparently after the *Williams* brief and the Supreme Court's *Stotts* decision, Chairperson Thomas eschewed support for these decisions and by 1985 described the use of "hiring and promotion quotas, so-called goals and timetables" as "fundamentally flawed."<sup>207</sup>

Chairperson Thomas also expressed opposition both to the adverse impact interpretation of Title VII and to the use of statistics to prove purposeful discrimination.<sup>208</sup> Despite Thomas's opposition, the EEOC did not change either its Uniform Guidelines on Employee Selection Procedures, which embodied and attempted to implement the adverse impact branch of Title VII, or its affirmative action guidelines, which encouraged employers to adopt and follow affirmative action plans with goals and timetables. Following the decisions of the Supreme Court in 1986 sustaining the use of numerical goals in consent decrees and in litigated decisions, Chairperson Thomas stated in his second confirmation hearings that goals and timetables would be used in EEOC cases and conciliation agreements when appropriate.<sup>209</sup> He also stated his recognition of and adherence to the adverse impact interpretation of Title VII, and stated in particular that no changes would be made to the Uniform Guidelines in contravention to the principles established in *Griggs*.<sup>210</sup>

Chairperson Thomas's hostile views toward the adverse impact branch of Title VII became known throughout the EEOC, and according to Congressman Augustus Hawkins, were determinative in the Com-

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205. Senator Thurmond continued, "Its [the EEOC] books could not be audited; reports were unreliable; accounts were mismanaged; fund controls were inadequate; and transactions were unrecorded." *Clarence Thomas, of Missouri, to be Chairman of the Equal Employment Opportunity Commission: Hearings Before the Senate Comm. on Labor and Human Resources*, 99th Cong., 2d Sess. (1986) [hereinafter *Thomas 1986 Nomination Hearings*].

206. See *supra* notes 177-83 and accompanying text.

207. See *Thomas 1986 Nomination Hearings*, *supra* note 205, at 65-66 (statement of Rep. Augustus Hawkins).

208. See Thomas, *The Equal Employment Opportunity Commission: Reflections on a New Philosophy*, 15 *STETSON L. REV.* 29 (1985); see also *Thomas 1986 Nomination Hearings*, *supra* note 205, at 36-39.

209. See *Thomas 1986 Nomination Hearings*, *supra* note 205, at 36-37, 122.

210. *Id.*

missioners' decisions on whether to bring class action suits.<sup>211</sup> Chairperson Thomas, however, denied in his 1986 confirmation hearings that there was any policy against bringing suits to enforce the adverse impact branch of Title VII.<sup>212</sup>

The Commission brought no testing or other adverse impact suits from 1983 to January 1989, and only one such proposed suit has been approved by the Commission; that approval came in the summer of 1988.<sup>213</sup> Thomas's views, therefore, were sufficient to discourage law suits either to enforce the adverse impact branch of Title VII or to prove purposeful discrimination through the use of statistics.<sup>214</sup> Without making any changes in the EEOC regulations or guidelines, or even in written statements of policy, therefore, the Commission in effect decided not to enforce one of the most important aspects of Title VII and declined to bring new suits using methods of proof that had been approved repeatedly by the Supreme Court.

During the first two years of Chairperson Thomas's leadership, the EEOC filed 195 and 310 suits, respectively.<sup>215</sup> Although facially comparable to the number of suits filed by the Commission in fiscal years 1977, 1978, and 1979, the number is in fact sharply lower because, under President Carter's Reorganization Plan No. 1,<sup>216</sup> suits filed after fiscal year 1979 included suits filed under the Age Discrimination in Employment Act and the Equal Pay Act. Indeed, the EEOC has been bringing more age discrimination suits than Title VII suits since 1979. Thus, the EEOC was bringing less than half the number of Title VII suits in 1983 and 1984 that it had brought during the mid-1970s.<sup>217</sup>

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211. See *id.* at 68-69 (testimony of Congressman Hawkins).

212. *Id.* at 41.

213. The last testing suit filed by the Commission under Title VII appears to have been *EEOC v. Atlas Paper Co.*, No. 1-83-251 (E.D. Tenn.), *rev'd*, No. 87-5421 (6th Cir. Feb. 17, 1989). That suit involved not only allegations by the EEOC that the employer used a test which had a discriminatory impact and was not validated, but also allegations that the standards used in testing blacks were not followed when applied to white candidates. The Court of Appeals for the Sixth Circuit noted the evidence of bias in the administration of the tests, as well as the prima facie case of disparate impact, and remanded for a determination of the adequacy of the employers evidence justifying its use of the examination.

214. For Title VII cases in which the Supreme Court has approved the use of statistics to make a prima facie case of purposeful employment discrimination, see *Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); and *Bazemore v. Friday*, 478 U.S. 385 (1986). The Court, of course, had long accepted such statistical proof to show the exclusion of blacks from juries and discrimination in voting. See *Norris v. Alabama*, 294 U.S. 587 (1934).

215. See *Thomas 1986 Nomination Hearings*, *supra* note 205, at 7 (chart entitled Enforcement Activities of the U.S. Equal Employment Opportunity Commission).

216. See *supra* note 146.

217. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, 20TH ANNUAL REPORT (1985) [hereinafter 20TH ANNUAL REPORT]. The EEOC filed 130 Title VII suits in fiscal year 1984 and 172 in fiscal year 1985. Thus, it filed fewer suits under Title VII in 1985 than in 1976. *Id.* at 21. EEOC's

Although the EEOC now has a less active role in enforcing employment discrimination laws, basic management problems continue. The Senate Special Committee on Aging found in the fall of 1988 that the EEOC's failure to process charges timely allowed over 7500 age discrimination claims filed after December 31, 1983, to be time barred by the two-year statute of limitations in the Age Discrimination in Employment Act.<sup>218</sup> The Commission's response to the problem was to amend its Official Compliance Manual and to place expiring age discrimination charges on the list of matters warranting priority handling.<sup>219</sup> Another indication of the EEOC's management problems is that, as of January 1989, the most recent Annual Report that the EEOC had submitted to the President and the Congress was its Report for the fiscal year ending September 30, 1985. The Reports for the fiscal years ending September 30, 1986, 1987, and 1988 have yet to be published; the present plan is to combine those three years into one report.<sup>220</sup>

### 1. Private Sector Suits

Approximately five years ago, two leading practitioners noted the increased difficulties facing lawyers in bringing and maintaining class actions on behalf of plaintiffs in equal employment opportunity cases.<sup>221</sup> The trend continued, and appears to have accelerated in the last five years. The number of class action, job discrimination lawsuits filed each year fell steadily from 1174 in 1976, to 326 in 1980, 156 in 1983, and only 48 in 1987.<sup>222</sup> While the decision of the Supreme Court in *General Telephone Co. v. Falcon*<sup>223</sup> in 1982 may have played some role, the sharp decline preceded that decision by several years. Of course no one can know what number of equal employment opportunity suits should be filed in order to enforce the law effectively. The sharp

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lack of success in its few major suits is widely known in the legal community. For example, the *Sears* case resulted in a decision for the defendant on the merits. *EEOC v. Sears*, 839 F.2d 302 (7th Cir. 1988); see *supra* notes 160-66 and accompanying text.

218. 134 CONG. REC. S16,707 (daily ed. Oct. 18, 1988) (statement of Sen. Melcher). The EEOC had failed to notify the charging parties, and employees at EEOC headquarters were apparently unaware of the problem. The EEOC had estimated that there were only 900 charging parties whose claims had become time barred under the statute of limitations. Congress then passed a statute requiring the EEOC to notify each of these persons; when EEOC attempted to do so, it found more than 7500 of these persons.

219. *Id.*

220. Telephone interview with a representative of the Office of Public Affairs of the EEOC (Jan. 9, 1989).

221. Chambers & Goldstein, *supra* note 17, at 243-45.

222. Memorandum from Richard Seymour, Lawyers Committee for Civil Rights under Law 7 (Feb. 26, 1988) (based upon data compiled and published by the Director, Administrative Office of the U.S. Courts).

223. 457 U.S. 147 (1982).

decline in the filing of class action suits, however, suggests strongly that it has become increasingly difficult for those harmed by discriminatory employment practices to find counsel who can and will represent their interests effectively.

## 2. The Department of Justice

The most notable affirmative initiative taken by the Justice Department in recent years was in suits alleging racial discrimination in employment against white suburbs of Chicago and Detroit. In 1983 the Justice Department filed a suit alleging racial exclusion in housing and employment against Cicero, Illinois, an all-white suburb of Chicago that abutted nearly all-black areas of South Side Chicago.<sup>224</sup> Cicero required that applicants for municipal employment be town residents. With a residential population that was more than ninety-nine percent white, the result was an all-white work force.<sup>225</sup> Twelve similar suits against other Chicago suburbs with durational residence requirements and all or substantially all-white work forces followed. After the United States prevailed in the Court of Appeals for the Seventh Circuit on its argument that the *Griggs* discriminatory impact principles were applicable to the durational residence requirement,<sup>226</sup> Cicero and ten of the other municipalities settled, and summary judgment for the United States was granted against the two municipalities that did not settle.<sup>227</sup> Similar suits were filed against eighteen suburbs of Detroit, including Dearborn and Warren, which have resulted in seventeen consent decrees to date. As a result, Cicero, Dearborn, Warren, and most of the other suburbs now have black municipal employees, including black police officers, for the first time in their history.

## 3. The Department of Labor

The enforcement role of the Office of Federal Contract Compliance Programs of the Department of Labor (OFCCP) since 1983 is more difficult to document. Media accounts have suggested that the Department of Justice attempted to have President Reagan revoke Executive Order 11,246 or amend it to remove the affirmative action provisions.<sup>228</sup>

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224. *United States v. Town of Cicero*, 786 F.2d 331 (7th Cir. 1986).

225. At the hearing on the government's motion for a preliminary injunction, Cicero attempted to show that the absence of blacks was not caused by the durational residence requirement with a survey of over 1300 municipalities that identified other communities without black employees both with and without residence requirements.

226. *Town of Cicero*, 786 F.2d at 334.

227. *United States v. Elmwood Park & Melrose Park*, Daily Lab. Rep. (BNA) No. 82 (N.D. Ill. Mar. 18, 1987).

228. The Author recalls several media reports suggesting that the President revoke Executive

No such changes have been made in the Order itself or in the affirmative action regulations, and no other regulatory initiatives have been taken.

Most of the major administrative cases filed during the Carter Administration have not been resolved; at least one has been pending on appeal from a ruling of an administrative law judge to the Secretary of Labor for more than five years.<sup>229</sup> Another case, which was formally initiated in 1977, was not resolved until January 1989.<sup>230</sup>

During the first three years of the Reagan Administration the OFCCP apparently issued informal directives that gave contractors significantly greater latitude in determining their obligations and sharply reduced the possibilities of a confrontation between the OFCCP and the contractor.<sup>231</sup> Much of the confusion over the hiring of minority contractors in the Reagan Administration ended in 1987 when the President apparently decided not to revoke or change Executive Order 11,246 itself and in 1987 when the Supreme Court rejected efforts to have affirmative action hiring and promotion goals declared unconstitutional.<sup>232</sup> Nevertheless, there appears to have been no major administrative litigation undertaken during the Reagan Administration, and the accomplishments of the OFCCP in the last few years are not apparent to the public.

#### IV. ACHIEVEMENTS AND FAILURES OF EQUAL EMPLOYMENT OPPORTUNITY LAW: WHAT HAS BEEN ACCOMPLISHED?

Some of the accomplishments of the civil rights acts in the last twenty-five years are apparent. Blacks, Hispanics, and women hold positions of authority and prestige, positions from which they would have been excluded twenty-five or fewer years ago. We see interracial groups socialize at lunch and after work. Blacks and women have achieved high political offices in many municipalities; in 1984 a woman received a nomination of a major party for the position of Vice President for the first time in our history; and in 1988 the possibility of electing a black president was considered realistic for the first time in history. Black

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Order 11,246.

229. See *St. Regis Paper Co., No. 77-1280. But cf. St. Regis Paper Co. v. Marshall*, 591 F.2d 612 (10th Cir. 1979) (holding that the contractor must exhaust administrative remedies before challenging an administrative decision).

230. See *Harris Bank & Trust Co. v. Marshall*, No. 79 C 3002 (1979). This case was resolved after a ruling by the administrative law judge on liability, but before a final decision on relief. Cf. *Harris Bank & Trust v. Marshall*, 20 Empl. Prac. Dec. (BNA) ¶ 30,180 (N.D. Ill. 1980).

231. Interview with Louis G. Ferrand, former Counsel, Civil Rights, Office of the Solicitor, U.S. Department of Labor.

232. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 1497 (1987).

athletes occupy a disproportionately large share of the all-star positions in baseball and football, sports from which blacks were barred totally or as a matter of practice as recently as the late 1940s. A show depicting the life of a middle-class black family has been one of the most popular shows in television; and black television and movie stars are numerous and amongst the highest paid. None of these events was a possibility before the Civil Rights Act of 1964.

To those of us who arrived in Washington in the mid-1950s, when segregation was still the *de facto* order, the change is dramatic and heartening. Although many traditionally black jobs still are filled predominantly with blacks and many traditionally female jobs are filled predominantly by women, the number of blacks, Hispanics, other minorities, and women entering positions traditionally reserved for white males is numerous and significant.

Observation, however, depends upon the vantage point of the observer. Personal observations may be atypical and may not be persuasive to those with different experiences. Washington is atypical of the country in many respects, and it may well be atypical in matters of equal opportunity. Those whose work or other daily activities are different from mine may have different observations. Some objective measures, however incomplete or fallible, must be used.

As noted above, the legislative history of Title VII shows the factual predicates that underlay the legislation. "Nonwhites" earned much less than whites, were disproportionately unemployed, and were concentrated overwhelmingly in less skilled, lower paid jobs. In addition, nonwhites were largely excluded from managerial and professional jobs, and were severely underrepresented in other "white-collar" and skilled employment. One way to assess the impact of the legislation, therefore, is to compare 1964 employment figures with comparable recent statistics.

Another measurement tool is also available. Under a provision of Title VII, the EEOC by regulation has required employers and others to maintain records and file reports showing employment and other information concerning the race, sex, and national origin of employees. Such records must be kept by private and public employers, local building trade unions, apprenticeship programs, and educational institutions.<sup>233</sup> Information from these reports is required by law to be kept confidential for each employer or other reporting entity unless and until

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233. 42 U.S.C. § 2000e-8(c) (1982); 29 C.F.R. pt. 1602 (1988). The last data on apprenticeship, however, were obtained in 1979. In the early years of the Reagan Administration, the Office of Management and Budget, apparently in response to a request by the Associated General Contractors of America, prohibited both the EEOC and the Bureau of Apprenticeship and Training from obtaining and publishing statistics on apprenticeship. Interviews with Herbert Hammerman.

litigation is filed, but is available to the public on a composite basis. The statistics compiled over the years of Title VII provide an important basis for comparison.

A. *Data Available to the Drafters of Title VII*

In the committee reports and debates on the passage of Title VII, the proponents of the legislation relied upon three kinds of statistics to show its necessity: Unemployment figures, median income, and distribution of persons by occupational group.<sup>234</sup> One way to measure the changes that have occurred since the passage of the Act is to use those same comparisons.

The comparative rates of unemployment have remained substantially unchanged since the adoption of Title VII. As Table 1<sup>235</sup> shows, the white unemployment rate in 1962 was 4.9 percent and the nonwhite unemployment rate was 11 percent, so that the nonwhite unemployment rate was 2.2 times that of the white rate.<sup>236</sup> That ratio has proved to be relatively persistent over the years. By 1970, the white/black ratio was reduced to 1.8, but rose to 2.4 in 1978 and 1979. In the following two years, 1980 and 1981, it was 2.3.<sup>237</sup> In 1987 and 1988, it had moved up to 2.5.<sup>238</sup>

The income statistics relied upon by the sponsors of Title VII were the median annual "wage and salary" incomes of year-round, full-time employees. In 1960 the median income for nonwhite adult males was 59.9 percent that of white males.<sup>239</sup> By 1970 the black male median income had risen to 68.1 percent of white males. The percentage was slightly higher, 70.4 percent, ten years later in 1980, and about the same in 1987, 70.5 percent.

The change in income ratios of black females to white females was more dramatic and more heartening. It jumped from 49.4 percent in 1960, to 81.9 percent in 1970, and to 93.3 percent in 1980. In 1987 the figure had dropped slightly to 91 percent.<sup>240</sup>

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234. See H.R. REP. NO. 570, *supra* note 30, at 2-3; H.R. REP. NO. 914, *supra* note 22, at 147-51; S. REP. NO. 867, *supra* note 45, at 2-3; see also 110 CONG. REC. 6541, 6547-48 (1964) (statement of Sen. Humphrey); 110 CONG. REC. 6554, 6562 (1964) (statement of Sen. Kuchel).

235. See *infra* Appendix, Table 1.

236. See H.R. REP. NO. 914, *supra* note 22, at 148.

237. See H. HAMMERMAN, A DECADE OF NEW OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970'S, at 29 table II-1 (Potomac Inst. 1984). Much of the analysis in this and the following pages was taken from Mr. Hammerman's work and was produced with his assistance, for which the Author is grateful.

238. See *infra* Appendix, Table 1.

239. H.R. REP. NO. 914, *supra* note 22, at 149.

240. Compare quoted numbers with those in H. HAMMERMAN, *supra* note 237, at 30 table II-4.

The ratio of female to male income is necessary not only to show the progress that has been made in the employment status of women, but also to place in context the rapid relative gains of black women. In 1960 the median income of year-round, full-time female employees was approximately sixty percent that of full-time male employees. By 1970 the female income had actually fallen to fifty-nine percent of the male income, and remained close to that level throughout the 1970s. By 1980, however, it had reached sixty percent again. By 1982 it had risen to sixty-two percent, and by 1987 had reached sixty-five percent of the median male income for full-time employees.<sup>241</sup> Comparing 1987 with 1980, we find an eight percent increase in the ratio of female/male median income in a seven-year period—a major movement.

Among full-time state and local government employers filing EEO-4 reports, the median incomes of their full-time black employees were closer to those of their white employees than in the private sector. In 1986 the median income for full-time employees was eighty-three percent that of white male employees; and the median income of black female employees was ninety-seven percent that of white female employees.<sup>242</sup>

The third comparison relied upon by the sponsors of Title VII was the distribution of persons by occupational group. Table 2<sup>243</sup> shows that 47.3 percent of white workers held white-collar jobs in 1962, but only 16.7 percent of nonwhite workers held such jobs. Comparable statistics for 1988 reveal the substantial movement of blacks into white-collar work. The overall numbers are 57.7 percent of white workers in white-collar occupations, and 43.3 percent of all black workers in such occupations. In 1962, 14.7 percent of all nonwhites were employed as private household workers, while by 1988 the percentage of blacks so employed had fallen to 1.8 percent. As Table 2 discloses, in each of the white-collar job groups, there was a considerable increase in black representation. In contrast, there was a major decline in the percentage of whites (from 35.4 percent to 27.1 percent) and in the percentage of blacks (from 39.5 percent to 31.7 percent) in blue-collar jobs. Increased automation and foreign competition undoubtedly resulted in the lower percentage of persons employed in such positions.<sup>244</sup> In the skilled crafts,

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241. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: CONSUMER INCOME, MONEY INCOME AND POVERTY STATUS 8 figs. 3, 19, 20 (Series P-60, No. 161 1987).

242. See EEOC, JOB PATTERNS FOR MINORITIES AND WOMEN IN STATE AND LOCAL GOVERNMENT (1986) (containing EEOC STATE AND LOCAL GOVERNMENT INFORMATION REPORT, EEO-4) [hereinafter EEO-4 REPORT].

243. See *infra* Appendix, Table 2.

244. For the 1948 and 1962 data in Table 2, see H.R. REP. NO. 914, *supra* note 22, at 148. The 1988 data are from unpublished tables compiled by the Bureau of Labor Statistics.

however, blacks made progress, rising from 6 percent in 1962 to 8.8 percent in 1987.<sup>245</sup>

### B. Data Collected By the EEOC for 1966

The concentration of black and other nonwhite employees in unskilled and semiskilled occupations, and their virtual exclusion from the more skilled, better paying positions also was reflected in the first set of statistics collected by the EEOC for the year 1966 from the EEO-1 reports. This information and the comparative statistics from 1987 are set forth in Table 3.<sup>246</sup> First, the table shows a substantial increase in the total numbers of blacks employed by firms reporting on EEO-1 forms—those firms with at least fifty employees for federal contractors or subcontractors, or at least one hundred with noncontractors. Blacks constituted 8.2 percent of the total reported employment in 1966 and 12.3 percent in 1987, while the overall black proportion of the population in the United States has only increased from 11 percent to 12 percent.<sup>247</sup> Blacks in the white-collar jobs increased from 2.5 percent in 1966 to 8.7 percent in 1987, and those with blue-collar jobs increased from 10.7 percent in 1966 to 15 percent in 1987. Only in the unskilled laborer group did the percentage of blacks decline.

In 1966 blacks constituted only 0.9 percent of the officials and managers in the labor force; by 1987 the figure had risen to 4.9 percent. In clerical positions, the proportion of blacks rose from 3.5 percent in 1966 to 12.9 percent in 1987. In skilled (craft) worker positions, the percentage of blacks rose from 3.6 percent to 9.2 percent.<sup>248</sup>

The record of women in private employment since 1966 is similar, and the improvement is dramatic. In 1966, women constituted 31.2 percent of the persons employed by employers filing EEO-1 forms, but only 9.3 percent of the officials and managers, 20.5 percent of the professionals, 22.6 percent of the technicians, 72 percent of the office and clerical employees, and 43.1 percent of the service workers.<sup>249</sup> In 1987, women constituted 45.9 percent of the persons employed by employers

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245. H.R. REP. No. 914, *supra* note 22, at 148.

246. See *infra* Appendix, Table 3.

247. Blacks constituted about 20% of the population of the United States from 1790-1840, but the overwhelming white composition of immigrants reduced this proportion to 15% by 1860 and to a low of 10% by 1930. The proportion was 11% in 1960 and 1970, but was estimated to have risen to 12% by 1986. R. FARLEY & W. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 10-11 (Russell Sage Found. 1987).

248. See PRIVATE SECTOR TOTAL EMPLOYMENT AND PARTICIPATION RATES OF MINORITIES AND WOMEN BY OCCUPATION, U.S. SUMMARY, 1966, 1974, AND 1985, at A-5; see also EEOC JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY (1987) (containing EMPLOYER INFORMATION REPORT, EEO-1) [hereinafter EEO-1 REPORT].

249. See sources cited *supra* note 248.

filing EEO-1 forms. These women accounted for 27 percent of officials and managers, 44.9 percent of professionals, 42.3 percent of technicians, 84.2 percent of office and clerical workers, and 55 percent of the service workers.<sup>250</sup>

Public sector employment by state and local governments shows greater improvement over a shorter period. In 1974, the first year in which such public sector statistics are available from reports filed with the EEOC, blacks constituted 14.8 percent of all employees of state and local governments filing reports, but only 5.3 percent of officials and managers, 7.9 percent of professionals, 8 percent of protective service personnel (police, fire, and prison guards), 13.5 percent of office and clerical employees, and 9.7 percent of skilled craft employees. By 1986 the overall percentage of black employees for such governments had increased to 18.1 percent, including 8.8 percent of officials and managers, 11.8 percent of professionals, 14.3 percent of protective service personnel, 19 percent of office and clerical employees, and 14.2 percent of skilled craft employees.<sup>251</sup>

Similarly, women were 35.5 percent of all state and local government employees in 1974, but only 18 percent of officials and administrators, 38.4 percent of professionals, 30.3 percent of technicians, and only 3.6 percent of protective service personnel. By 1986, women constituted 41.5 percent of all public sector full-time employees, including 28.5 percent of officials and managers, 47.9 percent of professionals, 39.4 percent of technicians, and 8.8 percent of protective service personnel. The only area in which women did not make progress in traditionally male jobs in the state and local government sector was in skilled crafts, where women were 4.1 percent in 1974 and remained at only 4 percent in 1986.<sup>252</sup>

Another measure sometimes used to assess progress under civil rights and other laws is the proportion of persons below the poverty line. In 1959, 55.1 percent of all blacks lived in families below the poverty line, as compared to an overall poverty rate of 22.4 percent.<sup>253</sup> By 1970 the overall poverty rate had been reduced to 12.6 percent and has remained close to that since then, falling to 11.1 percent in 1973, but rising to 15.2 percent in 1983, and falling again to 13.5 percent in 1987.<sup>254</sup> The black poverty rate was down to 33.5 percent in 1970, 30.9

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250. EEO-1 REPORT, *supra* note 248, at 1.

251. See *infra* Appendix. Compare EEOC JOB PATTERNS FOR MINORITIES AND WOMEN IN STATE AND LOCAL GOVERNMENT (1974) (containing *U.S. Summary Full-Time Employment and Participation Rates*) with *id.* (1984) and EEO-4 REPORT, *supra* note 242, at 1.

252. See sources cited *supra* note 251.

253. H. HAMMERMAN, *supra* note 237, at 36 table II-14.

254. See BUREAU OF CENSUS, *supra* note 241, at 9 fig. 5.

percent in 1979, but rose to 33.1 percent in 1987.<sup>255</sup>

Mr. Herbert Hammerman has noted another remarkable fact. In 1959 the poverty rate among blacks exceeded fifty percent even for traditional families headed by males. The poverty rate for black families with no husband present was seventy percent, and that for black families with a husband present was 50.7 percent; but by 1970 the rate for black families with a husband present had fallen to 21.7 percent, by 1980 to 17.9 percent, and by 1987 to 17.2 percent. The black poverty rate has remained as high as it is because of the increase in the number and proportion of families without a husband present.<sup>256</sup>

The statistics may be summarized as follows: Insofar as federal equal employment opportunity law was designed to reduce the disparity between black and white unemployment it has not been successful; insofar as it was designed to reduce the disparity between black and white median incomes it has had some success for black males and major success for black females; insofar as it was designed to reduce the concentration of blacks in unskilled and semiskilled jobs it has had some success; and insofar as it was designed to reduce the near exclusion of blacks from the upper levels of the employment spectrum, from which they traditionally had been excluded, it has had major success, although blacks are still comparatively underrepresented in the higher level positions.

With respect to the comparative position of women, federal equal employment opportunity law has had some impact on the comparative income of year-round employed women, whose median income remained at or below sixty percent that of men until the early 1980s, but has risen to sixty-five percent since that time. The law, however, has been a major factor in opening up occupations to women from which they previously had been excluded. Women now are widely represented in the managerial and professional positions and have made significant strides in both the private and governmental sectors.

### C. *Evaluation of Our Accomplishments*

The issue of causation is, of course, one of the most difficult in the study of history and other social sciences. We know that the Civil Rights Act was passed and that significant progress has been made in equal employment opportunity since that time. To prove beyond doubt that the progress in employment opportunities was due to the adoption, enforcement, and acceptance of federal equal employment opportunity law is probably impossible. I believe, however, that the weight of the

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255. See *id.* at 27 table 15.

256. See H. HAMMERMAN, *supra* note 237, at 27-28, 36 table II-14.

evidence suggests that it was. The employment patterns were too well entrenched, and the changes in the employment occupations and structures have been too dramatic and too broad to have occurred of their own force, in the absence of the law, law enforcement, and acceptance of the basic principles of the law by employers and others charged with implementing it.

On the other hand, the patterns of unemployment and the tendency of minorities and women to be clustered in certain jobs traditionally reserved for them persist. My experience suggests that racial factors are far more important in the individual decisions about where to work, where to live, and where to locate a factory, business, or office than public discourse acknowledges. A popular acceptance of the notion that crime and violence are associated with race has permitted the re-emergence of thinly veiled racism on a broad scale. In short, the legacy of hundreds of years of slavery and the patterns of discriminatory assumptions and fear are far deeper and more entrenched than many of us who joined the civil rights enforcement effort in the 1960s imagined.

The ability of this country to integrate the diverse individuals who have entered it stands in stark contrast to much of the world, as noted in the introduction. Whether persons of different color can be incorporated into the political, economic, and social systems in this country as have persons of different national origin remains unclear as does the ability of the society to make effective use of the skills of women. Effective enforcement of the equal employment opportunity law in the next decade, then, is at least a necessary, if not sufficient, predicate for the social and economic well being of the Nation.

#### V. PROBLEMS IN ENFORCEMENT AND PROPOSALS TO REMEDY THEM

The basic structure of substantive equal employment opportunity law has remained largely unchanged since the decisions of the Supreme Court in *Griggs*, *Albemarle Paper*, and *Teamsters* in the 1970s. While the decisions in the last ten years have been less favorable to the interests of minorities and women, the law remains enforceable and effective. Although the basic structure of the law has remained sound, federal enforcement agencies have been hit hard by the policies and decisions of the recent past; by the disputes over goals, quotas, voluntary affirmative action, and statistics; by the Reagan Administration's advocacy of the rights and interests of white males and employers; and by the wide-spread perception both within and without the government that the Reagan Administration would have been pleased if it did not have to confront the problems that follow from vigorous enforcement of the law.

While I disagree with my colleagues who suggest that from the out-

set of Title VII "the major force pushing litigation has been private litigation, not government-initiated litigation,"<sup>257</sup> I agree that effective enforcement by the government and private litigation are necessary for the successful implementation of equal employment opportunity law. The next subpart addresses the problems of effective enforcement by the federal agencies and the private bar, and then analyzes a major substantive problem involving the intersection of the law and industrial psychology—the use of "ability" tests for job selection.

A. *Government Enforcement of Federal Equal Employment Opportunity Law*

Effective enforcement of federal equal employment opportunity law requires that the executive branch show by its words and deeds that the law will be enforced. The last eight years have left two of the agencies charged with enforcement of that law, the EEOC and the Labor Department, largely inoperative. In addition, the credibility of the Justice Department as an agency committed to enforcement of that law has been severely damaged. The damage done, however, does not appear fatal, and can be reversed by prompt action by the incoming Administration. I have formulated the following recommendations after discussions with persons who are now, or formerly were, in positions of responsibility in public or private enforcement of equal employment opportunity law. My recommendations, in many respects, parallel those of the Citizens' Commission on Civil Rights.<sup>258</sup>

The first requirement of any effective law enforcement program is that the law be enforced as written in the statute and governing regulations and as interpreted by the courts, regardless of the personal views of those administering the law. Change should come only from changes in the legislation or in the regulations. While no one argues to the contrary, recent experience suggests strongly that this elemental prerequisite has not been followed during the last five years.

1. Enforcement of the Executive Order

Perhaps the most important step the new Administration can take to enforce equal employment opportunity law effectively is to re-establish the legitimacy and enforcement authority of Executive Order

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257. Chambers & Goldstein, *supra* note 17, at 256.

258. THE CITIZENS' COMM'N ON CIVIL RIGHTS, ONE NATION, INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990s (January 1989). The Citizens' Commission is chaired by Arthur S. Fleming, former Chairperson of the U.S. Civil Rights Commission. Its members include former Commissioners, such as Dean Erwin Griswold and Theodore Hesburgh, and high-ranking officials from the Nixon and Carter Administrations. The Author participated in two days of hearings and discussions leading to this report.

11,246. In my years at the Justice Department, I was repeatedly advised by defense counsel and others that an enforcement action by the Labor Department under that Order was the action most respected, and feared, by large private employers. The endorsement of the executive order program by the National Manufacturers Association was of key importance to its continued existence. President Reagan's refusal to revoke or revise that Order let the public know that his Administration was not opposed to all aspects of affirmative action. Thus, President Bush can revitalize that program without breaking with the policies of his predecessor.

A re-enactment of that Order, or a directive by the President to the Secretary of Labor and the Attorney General to enforce the Order both administratively and judicially, is perhaps the single most effective step President Bush can take to let the public know that he is serious about securing the rights of minorities and women. A determination to continue the executive order program will resolve much of the ambiguity caused during the prior Administration by its verbal war against affirmative action and will restore some of the damage done by that assault. A directive to the Attorney General is appropriate not only because of the history of the last Administration, but also because the Attorney General conducts federal court litigation for the Labor Department in its enforcement of the Executive Order, and because judicial enforcement of that Order is the responsibility of the Justice Department.

Presidential action is not the only course available. Congressman Hawkins proposed legislation to codify and strengthen Executive Order 11,246.<sup>259</sup> That bill is designed to attract the support of industry by eliminating the need for each contractor-employer to establish and maintain affirmative action plans and by substituting an annual report in which the employer presents employment statistics of the previous year and goals for the following year.<sup>260</sup> The bill provides for a private right of action and penalties for noncompliance, as well as the codification of the Executive Order.<sup>261</sup> In addition, it establishes a fund for education and training of students from the underrepresented groups who demonstrate financial need.<sup>262</sup> Overall, the bill has the merit of both codifying and simplifying the executive order program, and of recognizing that educational opportunities need to be tied to job opportunities.

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259. H.R. 4903, 100th Cong., 2d Sess., 134 CONG. REC. H4714 (daily ed. June 27, 1988).

260. *Id.*

261. *Id.*

262. *Id.*

## 2. Creation of a Cabinet Level Council to Coordinate Enforcement of Equal Economic Opportunity Laws

Several factors suggest the necessity of a Cabinet level council to coordinate enforcement of equal employment opportunity laws. First, the teacher training certification process in many states, which has decimated the ranks of black and Hispanic students seeking to become teachers in the last several years, has shown again the dependency of equal employment opportunity upon equal educational opportunity. Second, the relationship between discrimination in housing and job opportunities should be obvious to anyone who has contemplated the increasing concentration of job opportunities in the suburbs of major urban centers. Third, the similarities between the procedures for enforcement of the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, and Title VII are substantial, yet there never has been a structural basis for bringing the experience of the Department of Housing and Urban Development (HUD) and the EEOC together. Moreover, recent history has demonstrated the ineffectiveness of a Reorganization Plan that confers upon a non-Cabinet agency, such as the EEOC, the lead responsibility in law enforcement.

Thus, priority should be given to establishing a Cabinet level council responsible for coordinating the enforcement of civil rights and other laws bearing on equal economic opportunity. That council should consist of the Attorney General, the Chairperson of the EEOC, and the Secretaries of Education, HUD, and Labor. It should be given the responsibilities for coordinating the enforcement of those laws, reviewing the enforcement problems and accomplishments, and making an annual report and recommendations to the President and perhaps the Congress.

## 3. The Equal Employment Opportunity Commission

The problems of the EEOC have become so pervasive and endemic that some former high-ranking officials of the Commission have expressed their doubts as to whether the continued existence of the Commission is in the public interest.<sup>263</sup> The concept of an initial attempt at investigation and conciliation in employment discrimination claims is, in my view, a sound one for it provides some opportunity for informal resolution. New leadership of the Commission is a necessary prerequisite to transform the agency. President Bush should exercise his authority to replace the Chairperson and other Commissioners of the

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263. Conversations with Alvin Golub, former Deputy Executive Director of the Commission.

EEOC.<sup>264</sup> New leadership, however, is only a first step. The problems of the agency are deeply ingrained in its procedures and practices.<sup>265</sup> This Article makes two proposals to revitalize the EEOC, which, if implemented, would provide some safeguards for those filing discrimination charges and some hope that the Commission could reduce and eventually eliminate its backlog while being fair both to charging parties and to employers.

First, the Commission should be obliged to notify each charging party of the status of the charge every ninety days, and, after the passage of 180 days or the period of reference to a state or local agency, the charging party should be notified of her right to obtain a "right-to-sue" letter upon request. The notice would include a place for the charging party to show any change of address. For charges under the Age Discrimination in Employment Act, the notice should include the date when the statute of limitations would expire so that the charging party would be on notice of possible loss of rights.

The second reform would require the Commission to assess each charge separately and to conduct a full investigation only of those charges that state a claim upon which relief could be granted and that appear to have factual support. The determination of whether to make a full investigation would be based upon an interview with the charging party and, if that interview supported a claim upon which could be

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264. For a number of years the EEOC, which was modeled upon the National Labor Relations Board, contended that it was not a part of the executive branch, subject to direct Presidential control, but was an "independent agency" like the Board and the Federal Trade Commission, whose members served for the designated term unless removed for "good cause." See *Humphrey's Executor*, 295 U.S. 602 (1935). Analysis of the responsibilities of the Commission, however, shows that its functions are those of a law enforcement agency, which is the essence of the executive branch. Accordingly, the Office of Legal Counsel of the Justice Department had long considered the Commission to be part of the executive branch and the Commissioners removable at will by the President. That view was accepted by Chairperson Norton and the Commission under her leadership in the late 1970s.

265. Another major problem area is the separation of the General Counsel's office from the rest of the Commission, and the successful efforts of the heads of the agency from Chairperson Norton through Chairperson Thomas to subordinate the General Counsel to the Commission. At the present time, most of the lawyers are assigned to the district offices, and report to a district director, rather than a lawyer responsible to the General Counsel. In addition, the Commission receives advice from its Office of Legal Counsel, rather than the General Counsel; the Legal Counsel does not report to the General Counsel, but is in a separate office reporting directly to the Chairperson.

My view is that the Commission will not become a successful litigation agency until the Chairperson and General Counsel are working closely together and the General Counsel is given a budget; personnel responsibility, including authority to promote and terminate, over the legal staff and some investigators; and authority to determine whether to bring suits and the breadth of any suit brought. Reforms would also require the litigation lawyers, and investigators assigned to them, to be able to work on nights and weekends without violating their collective bargaining agreement. Precise reforms of the Commission's litigation program, however, are beyond the scope of this Article.

granted, the response of the employer or other respondent. Any charge not warranting an investigation would be dismissed, so that the charging party could pursue her right under the Civil Rights Act to seek a judicial remedy. While this procedure might result in the dismissal of some meritorious claims without investigation, the losses would be minimal compared to the present system, under which practically no charges are investigated and resolved promptly and few are investigated and resolved on the merits.<sup>266</sup>

### B. *Private Enforcement of Federal Equal Employment Law*

As noted earlier, the reasons for the sharp decline in the last few years of class action suits alleging discriminatory employment practices will probably remain unclear until a systematic investigation is made of the lawyers who previously filed such suits and their reasons for not continuing to do so. Until the reasons are known, a comprehensive program to make the changes necessary to secure an adequate level of private enforcement of the law will not be possible. One comment and two recommendations, however, will address the three most apparent problems.

As Chambers and Goldstein have noted, the decision of the Supreme Court in *General Telephone Co. v. Falcon*<sup>267</sup> may have led some of the trial and appellate courts to take a restrictive view of class actions under Title VII in order to expedite the resolution of the individual cases before them.<sup>268</sup> The Court's decision in 1988 in *Watson v. Forth Worth Bank & Trust Co.*<sup>269</sup> should serve as a partial corrective measure because the identification of a common subjective practice brought the case within the *Griggs* doctrine and thus helped to show that the particular practice harmed a group, not simply the plaintiff.<sup>270</sup>

Two additional problems presented by recent decisions of the Supreme Court are not as easily remedied. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*<sup>271</sup> the Court held in an antitrust case that expert witness fees are not recoverable under a statute providing for an award of attorney's fees unless the fee shifting statute expressly allows for recovery of expert fees. Title VII does provide for recovery of attorney's fees, but

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266. My understanding is that less than 2% of the charges filed under Title VII are investigated by the EEOC and result in a finding of cause. Interview with Alvin Golub, former Deputy Executive Director of the Commission.

267. 457 U.S. 147 (1982).

268. Chambers & Goldstein, *supra* note 17, at 243.

269. 107 S. Ct. 3227 (1988).

270. See Rose, *supra* note 199, at 68-73.

271. 107 S. Ct. 2494 (1987).

does not specify the recovery of expert witnesses fees.<sup>272</sup> Accordingly, the lower courts are beginning to rule that expert witness fees are not recoverable in these suits.<sup>273</sup>

At a minimum, therefore, substantial doubt exists that any plaintiff can retain an expert witness and still be made whole. The impact of that decision for class actions is ominous. No experienced equal employment opportunity litigator is likely to believe that it is possible to prevail in most class actions without an expert. As a practical matter, experts are necessary in statistical cases alleging purposeful discrimination to show that the disparities are statistically significant and to explain that significance to the trial judge.<sup>274</sup> A labor market expert also may be necessary. In cases involving the use of tests or other selection procedures, an industrial psychologist is also a practical necessity.

Thus, even if a plaintiff has the resources to maintain a suit and to retain an expert, and is ultimately successful in the litigation, she is not likely to recover the expert witness fees. The plaintiff will have to pay those fees out of the back pay or the attorney's fees recovery. In either event, the plaintiff will not be "made whole" as intended by Congress under Title VII.<sup>275</sup> The impact upon clients and lawyers in determining how broadly to frame a suit, and specifically whether to seek a class certification, is likely to be great. Legislation to remedy this problem not only under Title VII, but also under other fee shifting statutes, appears to be the appropriate solution.

A second, smaller problem pertains to employment suits under Title VII against the agencies of the United States. Notwithstanding the purpose of Congress to make victims whole, the Supreme Court ruled in *Library of Congress v. Shaw*<sup>276</sup> that no waiver of sovereign immunity should be found in section 706 of Title VII, so that interest on attorney's fees cannot be awarded against an agency of the United States, and current rates cannot be used in computing attorney's fees for a prevailing plaintiff or class under Title VII. Accordingly, in suits against agencies of the United States under Title VII, neither the plaintiff nor

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272. See § 706(k), 42 U.S.C. § 2000 e-5(k) (1982); see also 42 U.S.C. § 1988 (1982) (having the same effect).

273. See *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987) (voting rights case with language like that in Title VII); *Furr v. American Tel. & Tel. Technologies*, 824 F.2d 1537 (10th Cir. 1987).

274. See *Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447 (D.C. Cir. 1988) (holding that even though the court could take judicial notice of the statistical formulas in *Hazelwood*, see *supra* note 214 and accompanying text, the trial judge was within his discretion in excluding statistical formulas that were not presented to him in a form he could understand—that is, by an expert).

275. See *Moody*, 422 U.S. at 413-22; see also *supra* notes 129-37.

276. 478 U.S. 310 (1986). In light of the sue and be sued language in its charter and the desire of Congress to treat the Postal Service as an independent business, the Court reached a contrary conclusion with respect to the Postal Service. *Loeffler v. Frank*, 108 S. Ct. 1965 (1988).

her lawyer is made whole, even if the plaintiff prevails on the merits. Here again, the potential class action suit is discouraged, and remedial legislation appears to be the only recourse.

### C. *The Use of Unvalidated "Ability" Tests for Job Selection*

#### 1. The Problem

One of the most pervasive but least understood facts in the field of equal opportunity law is the enormous disparity between the scores on standardized "ability" tests of whites, on the one hand, and blacks and Hispanics on the other. For most standardized tests of "aptitude," "intelligence," or "cognitive ability," the mean score for blacks is approximately one standard deviation below that of the mean score for whites.<sup>277</sup> With this disparity, the average black score is in the bottom one-third of the white scores; only sixteen percent of the black scores are in the top one-half of the white scores; only six percent of the black scores are in the top one-third of the white scores; and only one percent of the black scores are in the top one-tenth of the white scores.<sup>278</sup>

Perhaps the gap between test scores on such tests for blacks and whites is best illustrated by reference to a recent article by an industrial psychologist who argues that ability (intelligence or "IQ") tests are the best predictor for job success.<sup>279</sup> Based upon the results of a test administered to a large, nationally representative sample, the author assumed that the median IQ score for blacks was 83.4, while for whites it was 101.8, reflecting a difference in performance of approximately one standard deviation.<sup>280</sup> Based upon such results, only 1.1 percent of the black population but 23.0 percent of the white population are intelligent enough to be a physician or an engineer; only 3.3 percent of the blacks but 35.2 percent of the whites are intelligent enough to be secondary school teachers or real estate sales agents; and only 28.4 percent of the blacks but 74.5 percent of the whites are intelligent enough to be firefighters, police officers, or electricians.<sup>281</sup> Thus, if an IQ test was the only factor used in the selection of applicants, a black applicant would

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277. See 1 ABILITY TESTING: USES, CONSEQUENCES, AND CONTROVERSIES 71-73 (A. Wigdor & W. Garner eds. 1982) [hereinafter ABILITY TESTING]; NATIONAL RESEARCH COUNCIL, INTERIM REPORT: WITHIN GROUP SCORES OF THE GENERAL APTITUDE TEST BATTERY 40 (A. Wigdor & J. Hartigan eds. 1988) [hereinafter INTERIM REPORT]; see also L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 321 (4th ed. 1984).

278. 1 ABILITY TESTING, *supra* note 277, at 72.

279. Gottfredson, *Societal Consequences of the g Factor in Employment*, 29 J. VOCATIONAL BEHAV. 379 (1986).

280. A standard deviation is a statistical measure of dispersion in a distribution, the square root of the arithmetic average of the squares of the deviations from the mean.

281. Gottfredson, *supra* note 279, at 400-01.

have only one-twenty-third the chance of being selected for medical and engineering schools as a white applicant; less than one-tenth the chance for being selected as a teacher or real estate agent as a white; and less than two-fifths the chance of being selected as a police officer, firefighter, or electrician as a white applicant.

A wide disparity also exists between the scores of whites and the scores of Hispanics and American Indians. On most of the standardized tests, the mean score of Hispanics was about half-way between that of whites and blacks, so that the difference between white and Hispanic-American scores and between white and American Indian scores is usually about one-half a standard deviation.<sup>282</sup>

Standardized "ability" tests are used widely in American society for a host of decisions affecting education and job opportunities. The use of these tests permeates selection for both undergraduate and graduate training: from the Scholastic Aptitude Test for admission to undergraduate training, to the Graduate Record Examination and the law school and medical school aptitude tests, to the National Teacher Examination and other teacher certification examinations. Similar tests are administered by the armed services for admission to officer training and for assignment within the services. In addition, most civil service systems use these examinations for hiring and sometimes for promotion. The practices of private employers vary widely, but standardized ability tests are the most commonly employed objective procedure in the private sector as well. Moreover, state employment agencies, under the direction of the United States Employment Service, use the General Aptitude Test Battery (GATB), a form of standardized "ability" test, as a basis for eligibility for and rank in referrals to private and public employers.<sup>283</sup> In addition, many examinations for occupational and professional licenses are written multiple choice examinations that parallel "ability" tests in many respects.<sup>284</sup>

Recent experience in the field of teacher training and certification illustrates how severely these tests restrict the opportunities of blacks and other minorities. In state after state, the number and percentage of blacks enrolled in teacher training programs in colleges and universities have been cut by two-thirds or more as standardized tests have been adopted as a prerequisite for entry. Because the "ability" tests are so widely used and commonly accepted, they provide a perfect reason or

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282. 1 ABILITY TESTING, *supra* note 277, at 73.

283. At least when ranking people for referral, the employment services have for a number of years been using different, race-based scores on an interim basis. See INTERIM REPORT, *supra* note 277. The controversy over the proper use of that test battery has not yet been resolved.

284. See Friedman & Williams, *Current Use of Tests for Employment*, in 2 ABILITY TESTING, *supra* note 277, at 99.

excuse for the disproportionate screening of blacks and Hispanics out of jobs, as long as the tests can be used lawfully without challenges to their validity for a particular job.

Federal equal employment opportunity law prohibits use of selection procedures for hiring or promotion that have a discriminatory impact on the employment opportunities of blacks, Hispanics, or women, unless the selection procedure has been shown to be predictive of successful performance of the job, or it is otherwise required for the effective operation of the employer's enterprise.<sup>285</sup> Most scholars view the decision in *Griggs*, congressional acceptance of its principles, and the congressional decision to extend its benefits to the federal, state, and local governmental sectors<sup>286</sup> as the most important decisions interpreting federal equal employment opportunity law.<sup>287</sup>

The Uniform Guidelines on Employee Selection Procedures were adopted after extensive public debate, comment, and public hearings. The record-keeping provisions are regulations under Title VII even though they are denominated as Guidelines and their substantive provisions are treated as such under Title VII. The Guidelines were adopted as regulations by the Secretary of Labor under Executive Order 11,246 and thus are binding upon federal contractors and subcontractors. Similarly, they are binding on the Department of Justice as regulations and on the federal government as an employer under the regulations of the Civil Service Commission and its successor, the Office of Personnel Management.<sup>288</sup>

The American Psychological Association (APA), acting through its Committee on Psychological Tests and Assessment, found a high degree of consistency between the Uniform Guidelines and the Association's "Standards for Educational and Psychological Tests."<sup>289</sup> After further clarification of the Guidelines by publication of questions and answers, the APA found consistency in all areas in which comparisons could be made.<sup>290</sup> Thus, the Uniform Guidelines are consistent with the standards of the profession of industrial psychology.

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285. *Griggs*, 401 U.S. at 424.

286. S. REP. NO. 415, *supra* note 55, 14-15; H.R. REP. NO. 238, *supra* note 120, at 20-22, 37; *Connecticut v. Teal*, 457 U.S. 440, 449-50 (1982).

287. See *Chambers & Goldstein*, *supra* note 17, at 245-46; see also Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHL.[-]KENT L. REV. 1 (1987).

288. 28 C.F.R. § 50.14 (1988); 29 C.F.R. § 1607 (1988); 41 C.F.R. § 60-3 (1988); 5 C.F.R. § 300.103(c) (1988); 43 Fed. Reg. 38,290 (1978). Under Title VII, the Uniform Guidelines have the force and effect of regulations only with respect to their record-keeping provisions because the EEOC does not have substantive rulemaking power. See §§ 706, 709(c), 42 U.S.C. §§ 2000e-5, 2000e-8(c) (1982).

289. See 45 Fed. Reg. 29,530 (1980).

290. *Id.*

While the Supreme Court in *Watson v. Fort Worth Bank & Trust* unanimously rejected the government's position that *Griggs* did not apply to "subjective" selection procedures, the Court did so without a majority opinion.<sup>291</sup> A plurality of four went to great lengths to address the concerns raised by the government and to show that the Court's ruling should not cause employers to adopt quotas or engage in preferential treatment.<sup>292</sup> Thus, that opinion reopened or raised several important issues covered by the Uniform Guidelines concerning the application of *Griggs*, which most courts and commentators thought had been settled long ago. Chief among the issues is whether the employer bears the burden of persuasion as well as the burden of production once the discriminatory impact of the selection procedure has been shown.<sup>293</sup>

In an amicus brief filed in the Supreme Court's 1989 Term, the Solicitor General took the position that the plaintiff has the burden of persuasion on the issue of the validity of a test shown to have a discriminatory impact.<sup>294</sup> The government took that position even though the Uniform Guidelines expressly state that the test "user" (the employer, labor organization, or employment agency) may rely upon any of the three commonly accepted methods of showing validity, or when that is not feasible, the "user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accordance with Federal law."<sup>295</sup> The government's brief does not discuss the Guidelines when addressing the burden of proof question.

One useful initiative recently taken by the Department of Justice has been to encourage the cooperative validation of standardized tests for police officers. The Educational Testing Service withdrew from the police and firefighter testing business early in 1986 after a challenge by the Department of Justice to their examination in Nassau County, New York.<sup>296</sup> Assistant Attorney General Reynolds was personally responsi-

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291. *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988).

292. *Id.* at 2782-91.

293. *See id.* at 2789-90.

294. Brief for the United States, *Wards Cove Packing Co. v. Antonio*, 108 S. Ct. 2896 (1988) (No. 87-1387).

295. *See* 29 C.F.R. §§ 1607.5A, 1607.6B (1988). The introduction to the Guidelines originally stated:

As previously noted, the employer can modify or eliminate the procedure which produces the adverse impact. . . . If the employer does not do that, then it must justify the use of the procedure on the grounds of "business necessity." This normally means that it must show a clear relation between performance on the selection procedure and performance on the job. In the language of industrial psychology, the employer must validate the selection procedure.

43 Fed. Reg. 38,291 (1978).

296. *See* *United States v. Nassau County*, Civ. No. 77-C-1881 (police department, settlement order dated 7/13/85; report of experts dated 11/22/85). The ETS announced its withdrawal from the field in a form letter dated January 1986, to its test users.

ble for this initiative because the Justice Department, like the other enforcement agencies, took the position that the development of selection procedures was the responsibility of the employers. Despite intensive litigation and validation efforts in the law enforcement field since 1972, there existed no adequate, validated selection procedure for police officers.<sup>297</sup> A kind of test, which includes a portion based upon biographical data, has been shown in the private sector in both clerical and supervisory positions and in the military to have not only less adverse impact than the standardized "ability" or IQ tests, but also to have more validity and is now being developed for use in police selection.

## 2. Recommendations

The first requirement for effective enforcement in the field of testing is that the administrative agencies enforce the law as it now stands. The President should direct, or the agencies should announce, that the enforcement agencies will enforce the disparate impact branch of equal employment law (including lawful regulations and guidelines) and make administrative changes only after notice and opportunity for comment. In particular, the EEOC and the Department of Labor should take effective measures to apply the law to discriminatory impact cases as well as to cases of purposeful discrimination.

The initiative taken by the Department of Justice in helping to establish a consortium approach to testing for police officers should be extended to other major job categories for which good tests, with as little discriminatory impact as possible, have not yet been developed. The biographical data approach has yielded lower adverse impact, but at least as much validity when used in the private sector for clerical and supervisory selection, and when used for selection of candidates for the armed forces.<sup>298</sup> While the results of the large scale police test development program proposed by the Department of Justice are incomplete, they are encouraging and may provide an alternative strategy for testing candidates for other major job classifications. Tests for persons entering teacher training and for teachers should be high on the list for the development of new examinations. Whether such cooperative ventures are encouraged by the federal government, or undertaken without such assistance, they may help to provide a long-term resolution of the tension between equal employment opportunity and the use of objec-

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297. The test is being developed in the police departments of Suffolk County, New York, Georgia State Police, Las Vegas, Nevada, and a number of other police departments.

298. In *United States v. Suffolk County*, 49 *Empl. Prac. Dec. (CCH)* ¶ 38, 793 (E.D.N.Y. 1988) (No. 83-2737) (police department), the district court approved the first operational use of the new police examination, notwithstanding that further research was being conducted by Order of April 12, 1988.

tive tests, which has caused much litigation and controversy in the last twenty-five years.

## APPENDIX

TABLE 1  
UNEMPLOYMENT RATES BY RACE, SEX, AGE, AND SELECTED MAJOR  
OCCUPATIONAL GROUP, 1962 AND 1988

	1962			1988		
	White	Black	Ratio: Black/ White	White	Black	Ratio: Black/ White
Total	4.9	11.0	2.2	4.7	11.7	2.5
Male	4.6	11.0	2.4	4.7	11.7	2.5
16 to 19 years	12.3	20.7*	1.7	13.9	32.7	2.4
20 to 24 years	8.0	14.6	1.8	7.4	19.4	2.6
25 years and over	3.6	9.4	2.6	3.6	8.3	2.3
Female	5.5	11.1	2.0	4.7	11.7	2.5
16 to 19 years	11.5*	28.2	2.5	12.3	32.0	2.6
20 to 24 years	7.7	18.2	2.4	6.7	19.8	3.0
25 years and over	4.3	4.8	1.1	5.0	9.7	1.9
Selected Major Occupational Group						
Clerical Workers	3.8	7.1	1.9	3.4	7.3	2.1
Craft Workers	4.8	9.7	2.0	4.9	10.1	2.1
Operatives	6.9	12.0	1.7	6.5	12.6	1.9
Nonfarm Laborers	11.0	15.8	1.4	10.1	18.1	1.8
Private Household Workers	3.1	7.1	2.3	4.8	8.4	1.8
Service Workers, except private household	5.3	10.8	2.0	5.7	12.2	2.1

Note: Data are for nonwhites (predominantly black) in 1962

\* 1962 data cover 14 to 19 years.

Source: 1962 — H.R. REP No. 914, 88th Cong., 1st Sess., at 148. 1988 — Unpublished tables of the Bureau of Labor Statistics — U.S. Department of Labor

TABLE 2  
OCCUPATIONAL DISTRIBUTIONS OF WHITE AND  
BLACK EMPLOYEES: 1948, 1962, AND 1988

Major Occupational Group	Percent of Total					
	White			Black		
	1948	1962	1988	1948	1962	1988
Total	100.0	100.0	100.0	100.0	100.0	100.0
White-Collar Workers	39.1	47.3	57.7	9.0	16.7	43.2
Professional and Technical Managers, Officials and Proprietors	7.2	12.6	16.4	2.4	5.3	11.4
	11.6	11.9	13.0	2.3	2.6	6.8

Clerical Workers	13.6	15.8	15.7	3.3	7.2	17.8
Sales Workers	6.7	7.0	12.5	1.1	1.6	7.2
Blue-Collar Workers	40.5	35.4	27.0	39.7	39.5	31.7
Craft Workers	14.6	13.6	12.3	5.3	6.0	8.8
Operators	21.0	17.5	10.7	20.1	19.9	16.4
Laborers (nonform)	4.9	4.3	4.0	14.3	13.6	6.5
Service Workers	7.9	10.6	12.1	30.3	32.8	23.1
Private Household	1.5	2.1	0.7	15.6	14.7	1.8
Other Service Workers	6.4	8.5	11.4	14.7	18.1	21.4
Farmworkers	12.4	6.8	3.2	21.0	11.0	1.9
Farmers	7.8	4.0	1.3	8.5	2.7	0.1
Laborers	4.6	2.8	1.9*	12.5	8.3	1.8*

Sources: 1948 and 1962 — H.R. REP. No. 914, 88th Cong. 1st, Sess. at 148. 1988 — Unpublished Tables of the Bureau of Labor Statistics, U.S. Dept. of Labor.

Note: Data labelled black for 1948 and 1962 career

\* Includes forestry and Fishing occupations

TABLE 3  
PARTICIPATION RATES OF BLACKS AND  
WOMEN BY JOB CATEGORY, 1966 AND 1987.  
PERCENT OF EMPLOYEES

	BLACKS		WOMEN	
	1966	1987	1966	1987
Total	8.2	12.3	31.5	45.9
White-Collar Workers	2.5	8.7	44.1	54.5
Officials and Managers	0.9	4.9	9.4	27.0
Professionals*	1.3	4.9	14.0	44.9
Technicians*	4.1	9.4	31.1	42.3
Sales Workers	2.4	10.4	38.7	56.3
Office and Clerical Workers	3.5	12.9	72.4	84.2
Blue-Collar Workers	10.7	15.0	20.8	26.8
Craft Workers (skilled)	3.6	9.2	6.3	11.3
Operators (semi-skilled)	10.8	16.8	27.6	33.5
Labors (unskilled)	21.1	19.3	23.9	34.2
Service Workers	23.0	24.4	43.3	55.1

Source: Report EEO-1 of the EEOC

\* A change in definition affecting professionals and technicians after 1966 contributed to the considerable increase of female professionals and the limited increase of female technicians.